No. _____

In The
Supreme Court of the United States

ERNEST MATTHEWS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 16, 2009

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QUESTIONS PRESENTED FOR REVIEW

1. WHERE THE EVIDENCE ONLY SHOWED AN ACCUSED'S MERE PRESENCE IN AN OPEN AREA WHERE CONTRABAND WAS LOCATED WHILE OSTENSIBLY BEING DELIVERED TO ITS ALLEGED PURCHASER, SUCH PROOF IS INSUFFICIENT TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

2. WHERE A JUDICIAL FINDING IS MADE IN THE WAKE OF "NEWLY DISCOVERED EVIDENCE" THAT THE GOVERNMENT'S CHIEF WITNESS HAD RENDERED FALSE TESTIMONY ESSENTIAL TO THE GOVERNMENT'S CASE (INCLUDING HIS IDENTIFICATION OF THE PETITIONER AS A PERSON HE HAD PREVIOUSLY MET AND AS THE PURCHASER) DUE PROCESS AT LEAST REQUIRES THAT A NEW TRIAL BE GRANTED.

3. GIVEN THE GUILTY VERDICT IN THIS CASE COULD VERY WELL HAVE BEEN BASED ON THE JURY'S DISBELIEF OF THE DEFENSE'S EVIDENCE IN THE WAKE OF THE CONSIDERABLE EVIDENCE PROVIDED BY THE GOVERNMENT'S CHIEF WITNESS, INCLUDING IDENTIFICATION TESTIMONY THAT WAS SHOWN TO HAVE BEEN FALSE DESPITE ITS HEAVY EXTOLMENT BY THE GOVERNMENT OF THE DEFENSE'S PROOF, IT FOLLOWS A NEW TRIAL WAS REQUIRED.

4. WHERE THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, THAT IS, CONTRARY TO THE WEIGHT OF THE

CREDIBLE EVIDENCE, THE GRANTING OF A NEW TRIAL IS WARRANTED.

5. WHERE THE POST-TRIAL DETERMINATION IS MADE THAT THE GOVERNMENT'S CHIEF WITNESS, AN INFORMANT, HAD PROVIDED INDISPUTABLY FALSE TESTIMONY (WHICH EVIDENCE WAS ESSENTIAL TO THE GOVERNMENT'S CASE, AND VOUCHED FOR AS BEING SUCH) A GUILTY VERDICT BASED ON SUCH EVIDENCE PERFORCE IS AGAINST THE MANIFEST WEIGHT OF INCONTROVERTIBLE DEFENSE EVIDENCE WHICH IS BELIEVED TO HAVE BEEN SUFFICIENT TO WARRANT AN ACQUITTAL.

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

CONSTITUTION

RULES, STATUTES AND OTHER AUTHORITIES

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Earnest Matthews, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals in and for the Sixth Circuit, entered herein on **October 30, 2008**. See **Appendix "A," at p. 1a**.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, affirming the conviction (as indicated above), is included in the Appendix as **Appendix "A."** The "Memorandum Opinion and Order" of the United States District Court for the Northern District of Ohio (denying the Motion for New Trial) is designated as **Appendix "B," p. 16a**. **Appendix "C," p. 59a**, is another Memorandum of Opinion and Order by the United States District Court.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Opinion by the Court of Appeals, as shown above, was entered **October 21, 2008**. The jurisdiction of this Court is seasonably invoked under **Title 28 U.S.C., §1257(3)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provisions of the Constitution involved are:

> **Fifth Amendment:** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> **Sixth Amendment:** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

The principal provisions of the Statutes involved are:

> **Title 21, United States Code, §841(a)(1):** Except as authorized by this subchapter, it shall

be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Title 21, United States Code, §841(a)(2): to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

STATEMENT OF THE CASE AND FACTS

The facts show Petitioner, Earnest Matthews, was convicted for attempting to possess with intent to distribute more than 100 kilograms of marijuana, in violation of **21 United States Code, §846, 841(a) & 841(b)**. On Appeal, the Court rejected *inter alia* the contention that petitioner's "mere presence" was insufficient to support the guilty verdict. And, it also ruled that a new trial was not warranted in the wake of certain very compelling newly discovered evidence. This evidence both Courts below conceded, in cogent findings, undisputably showed the chief witness against the Petitioner had falsely identified him as the person he had met in Arizona and the person to whom he was to deliver the drugs to in Ohio.

This witness, one Arnolfo Quintana, after being discovered by a Kansas State Highway Patrol Officer in possession of "thirty nine bales of marijuana weighing 749 pounds," capitulated and agreed to cooperate with the authorities (**Appendix "A," at p. 2a**). To this end, he agreed "to continue with the load and make a controlled delivery" under the auspices of the Drug Enforcement Agency (DEA). Agents of the DEA, who were involved in the surveillance of

Quintana as he drove from Kansas to the Cleveland, Ohio area, contacted DEA Special Agent Leppla in Cleveland, Ohio. This agent was advised of the impending delivery and was told where it was to take place. (**Id., pp. 2a-3a**.) At around 6:00 pm, Agent Leppla and another officer, one Jamal Ansari, took settled positions in what can be described as a warehouse area at the destination point. As the Court noted, "there was virtually no traffic on the street it was Easter Sunday." (**Id., p. 3a**.) Here, the Opinion compellingly noted, and it is repeated here because of its significance, that:

> Leppla testified that at about 6:40 pm, two vehicles - a two-tone Chevrolet Suburban followed by a black Chevrolet Trailblazer, each driven by a black male and containing no other passengers - pulled up to a garage door at the warehouse. Leppla stated that the driver of the Suburban, whom he later identified as Matthews, exited the vehicle, entered the warehouse through a 'main door,' and then pulled up the garage door from the inside. . . . Leppla testified at trial the entire visit lasted about fifteen minutes, although this was inconsistent with his testimony at the suppression hearing that they had stayed for about twenty six minutes.
>
> At approximately 7:10 pm, Quintana arrived at the garage, driving the tractor trailer. Minutes later, the Trailblazer and Suburban reappeared. Leppla testified that they were driven by the same men who had departed minutes earlier. Matthews, the driver of the Suburban, again opened the garage door. He met briefly with

> Quintana and the driver of the Trailblazer, later identified as Matthews' co-defendant Edward Jackson, then entered the garage out of Leppla's sight. Jackson climbed into the bed of the tractor-trailer and, with Quintana's assistance, began loosening the canvas straps of the pallet containing the marijuana. . . . Approval was given, and more than six officers emerged from hiding, identified themselves as officers, and arrested Quintana, Matthews and Jackson. A search of Matthews revealed approximately $3200 in cash, and the officers found approximately $500 in cash on the floor near where they had arrested him. The Trailblazer contained rental car papers, gallon sized plastic baggies, and rolls of contact paper.

Id., pp. 4a-5a.

The Record shows the parties stipulated that Matthews departed, via air, to Las Vegas, on March 1, 2005. And, he returned in the early morning hours on March 14, 2005. Significant here, after the officers (arguably for ulterior reasons) *told Quintana that Matthews had been in Tucson, he suddenly remembered that he met Matthews in mid March at a meeting with a man named Guzman at a truck stop outside of Tucson, AZ*. And, that (it was said by Quintana) it was there Matthews was introduced as the "boss and the person [he] would be delivering the marijuana to." (**Id., p. 6a**.)

The defense produced evidence that showed Matthews, our Petitioner, and a girlfriend had traveled from Las Vegas and they were in Tucson from March 7 through March 9, where she was

"interview[ed] for a job." (**Id., p. 7a.**) The girlfriend also testified that at all times she and Matthews were together and that "Matthews did not meet anyone at a truck stop." (**Ibid.**) Other defense evidence *disputed* Leppla's testimony that Matthews was the driver of the Suburban vehicle seen on the premises that arrived and departed after a short while before Quintana arrived with the drugs. (**Ibid.**)

Indeed, a defense witness, a friend of the co-defendant, named Dartanyan Thompson, testified that he not only owned the Suburban, but, contrary to the agent's testimony, he (not Matthews) had driven it there on the occasion referred to by the agents. His evidence also showed he was there to look at "some motorcycle parts." (**Ibid.**) Also, Matthews' aunt testified that she had "rented the Trailblazer," Matthews drove to the site. Even this is not all, her testimony was that she "owned the contact paper and baggies" found in her vehicle. (**Ibid.**) Significant here, the Court regarded these items as having a drug use - - as the Government had contended. And, the Court of Appeals, not unlike the jurors, inferentially showed it disbelieved her testimony. Both of these Courts clearly believed the jurors would have reached this same conclusion even if they had not heard the proof that showed Quintana was a liar, or if he had not even testified.

Most critical here, the trial Court, in dealing with the Petitioner's "Motion for a New Trial," compellingly provided us with the following utter castigation of Quintana's testimony. The essence of this unqualified factual determination (that the witness had provided false evidence) is truly manifest. Here, the District Court wrote:

> Quintana testified that he had visited Cleveland, Ohio in January 2005 to have a truck repaired. He further testified that he had not visited Cleveland at any other time prior to the arrest. Moreover, Quintana testified that he met Matthews in [Tucson in] mid-March 2005 (specifically March 15, although he was unsure regarding the exact date) and the semi-tractor trailer *was loaded with marijuana the following day. . . . Beyond damaging the credibility of Quintana's entire testimony, the newly discovered evidence* is relevant in two significant respects: (1) *it demonstrates that Quintana could not have met with Matthews* on March 15, 2005 [*in Tucson*] as [Quintana] was in Cleveland, Ohio; and (2) Quintana's presence in Cleveland, Ohio in March 2005 . . . provides corroboration to Jackson's claim that he washed Quintana's semi-tractor trailer in March, 2005.

Appendix "B," at pp, 54a-55a. (*Emphasis supplied.*)

Again, despite concluding that Quintana had presented indisputably false testimony, the District Court nonetheless managed to deny Matthews' Motion for a new trial. The Court, in doing so, literally oraculated that the newly discovered evidence was largely cumulative and impeaching and that it would not have impacted the outcome of the trial. (**Id., p. 55a-56a**.) This the Court surprisingly did after it had categorically concluded the witness had given considerably "false testimony." (**Ibid**.) Also significant here, the Court of Appeals perforce had to have credited the District Court's florescent finding that the "*entirety*" of Quintana's testimony was damaged by this evidence. (**Appendix "B," p. 57a**.)

(*Emphasis supplied.*) Simply put, the Court agreed the "newly discovered evidence" established that Quintana could not have met Petitioner in Tucson. And, it is likewise clear these Courts agreed this was so because Quintana was in Cleveland when Petitioner was in Arizona. Even this is not all, these Courts also found that clearly Quintana had outright lied about not having been in Cleveland since the January prior to this arrest.

Yet, despite these categorical findings these Courts somehow were able to convince themselves Quintana's testimony (although heavily endorsed by counsel-opposite) was nonetheless harmless. Indeed, to reach this point the Court of Appeals indulged itself in a very clever play on words. Here, the Sixth Circuit first premised its *ad hoc* rationales on the naked and unclad assertion that at the trial the defense "had already *fatally damaged* Quintana's credibility" (**Appendix "A," p. 14a**). (*Emphasis supplied.*) Clearly, the Court's apparent misuse of the root word "fatal" is compellingly significant. Simply put, its use cannot be defended. This follows because the word "fatal" carries with it a strong suggestion of the inevitability of fate. Also, it is a word that is interchangeable with "deadly." Yet, the Court itself shows it was not so persuaded. For if it were, clearly it could not have resolved against Petitioner's contention that his "mere presence" in the area (where Quintana was arrested with the drugs) failed to provide a sufficient basis for the jury to conclude guilt beyond a reasonable doubt. (**Id., p. 15a.**) Consider here, the following excerpt from the Court's dispositive thesis:

> . . . *Finally, the Government presented Quintana's testimony suggesting that Matthews had met earlier in Arizona with Guzman, the alleged source of marijuana.*

Id., p. 10a. (*Emphasis supplied.*)

Of course, counsel is bewildered, as this Court surely will be, as to how the Court (after labeling it false) was able to resurrect the most impactful segments of Quintana's condemned testimony, *i.e.*, (a) his identification of Ernest Matthews as the man he was introduced to in Arizona, and (b) his identification of Matthews as the person to whom he would be delivering the drugs to in Cleveland. Indeed, the Court did this in a most remarkable way. This follows because the Court was able to somehow divine from evidence it had compellingly regarded as being "fatally" flawed, the idea that "Quintana's testimony *suggesting* that Matthews had met earlier in Arizona with Guzman, the alleged source of the marijuana" (**ibid**), could nonetheless still be credited and relied on by the jury. Also, it seems clear that to the extent the Court was willing to credit Quintana's evidence as proof he was indeed with Matthews in Arizona, it perforce had to be their belief the defense witnesses willfully failed to tell the truth in their evidence - - a conclusion that was only possible if Quintana was believed. Stated another way, the Court not only fully credited testimony it branded as false as being proof of guilt, it elevated this "false" testimony to being proof the defense witnesses had lied. Obviously then, if the jury so reasoned then clearly there is no way it can be said with impunity the jury did not rely on "false" evidence in convicting Ernest Matthews.

Talk about mental gymnastics. Clearly, something is amiss here. For how can the Court of Appeals possibly credit, and elevate to a proved level, what it says was merely *suggested* in the witness Quintana's testimony (***ante*, pp. 8-9**), *i.e.*, that he and Ernest Matthews had met with a man named Guzman in Arizona, and that this Guzman had supplied the drugs (here involved) that were loaded the *next day* after this meeting into Quintana's truck? Given Quintana testified he then headed to Cleveland with this load, how could these Courts also credit (or stated another way, how could they believe, as would have to be the case) Ernest Matthews with being in Arizona with Guzman and Quintana within several days of the arrest in Cleveland - - as would have had to be the case? If nothing else, the jury clearly was persuaded by what the Court labeled as a mere "suggestion" (***ante*, pp. 8-9**).

For our part, and this is said in all deference to the Courts below, there is no way it can even arguably be said this jury did not believe Ernest Matthews was in Arizona with Quintana as the Government persuaded the jury was the case. The fact that counsel punctuated the false evidence with a grossly impermissible peroration accentuates the wrongs visited on Petitioner.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The metaphysical acumen that would have enabled the jurors, in this case, to have heard devastatingly prejudicial testimony that was attached to (as an integral part of) the Government's case and not credit

its impact on their verdict is really too abstract to be of any practical use.

The point referenced above, and discussed below, deals with the Rulings of the Courts below. All of these Rulings seem clearly to ignore an indelible fact. Simply put, the Rulings being assailed in this Petition are premised by the fact that the Courts below found the newly discovered evidence conclusively showed the State's chief witness *lied* in his identification of the Petitioner as the person to whom he was delivering the drugs centralized in this case. And, that he *lied* as to his own whereabouts as they relate to certain critical dates. Yet, despite the significance here of the cogent findings, these lower Courts have taken the position, outlandish in our judgment, that the verdicts were *uninfluenced* by the jury's consideration of these brazen falsehoods. The upshot of this ruling, that there was no likelihood that the verdict affected the outcome of the case, is that Ernest Matthews has been sorely victimized.

What makes the position taken by these Courts even more ridiculous is that it is layered by the raw fact that the Government continues to effectively vouch for Quintana's credibility and endorse his evidence. With this being so, since the jury was unaware of the *lies* Quintana told, surely counsel's assertions in this regard cannot continue to be ignored.

ARGUMENT NO. I

ONE'S MERE PRESENCE AT THE SITE OF AN INTENDED CONTROLLED DELIVERY OF NARCOTICS CANNOT SUPPORT A FINDING OF GUILT OF AN ATTEMPT TO POSSESS WITH INTENT TO DISTRIBUTE IN VIOLATION OF 21 UNITED STATES CODE, §§841 (a) AND (b).

The trial Court precisely concluded the testimony provided by the Government's chief witness, Quintana, was simply not worthy of belief. (**Appendix "B," pp. 54a-56a**.) Despite this awesome fact, the Court of Appeals nonetheless credited segments of this testimony in its resolution of this appeal (***ante*, p. 9**). But, even this false validation pales into insignificance in the wake of the Court's indefensible belief that the jury did not feed into and rely on, his evidence as the prosecutor expressly[1] advised them to do (**tr., p. 663**). Indeed, this was even more true because clearly to convict the jury had to reject the defense's evidence. This inexorably follows because it had been carefully tailored and presented to show Quintana could not even possibly have seen the Petitioner in Arizona as he proclaimed (in the Government's effectively orchestrated testimony) *and* as the Government vigorously assured the jury was the case. Despite this dispositive flaw in the Court's expressed ratiocinations, given even the Court's total open

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[1] Actually what counsel said (in her wholesale endorsement of this perjurer) was the jury "should believe him because he was brutally honest" (**tr., p.663**), and because "he did not equivocate." (**Ibid**.)

condemnation of Quintana's proof (arguably credited by the jury) that showed Petitioner was in Arizona and had purchased these drugs there, and given the Government's further conclusion the defense witnesses lied in their evidence, it could not be any clearer that the Government's proof simply does not establish anything other than Matthews' presence at the site of his arrest.

Now, we readily concede, in advance of the Government's response argument, that a defendant's presence at the place, or in the area, where contraband was being delivered may very well *not* be coincidental. But, the culpability of this presence depends on, indeed hinges on, whether the circumstances can be said to fairly imply criminal participation by the accused. Distilled then, the Courts below seem clearly to have inexplicably overlooked the fact that, at most, they only show Matthews arrived in a vehicle and entered a building on the premises. It was the co-defendant who engaged the Government's stooge in conversation and was dealing with the truck loaded with drugs when the agents made their summary appearance and their arrests. Inexorably this point thus raises the dispositive question here.

Simply put that question asks: would the jury have convicted Matthews if they *had* known the Government's counsel falsely placed Petitioner in Arizona; *had* falsely proclaimed that Matthews was the person their witness met in Arizona; that he (the witness) *had* falsely testified he was told Matthews was the "boss" in connection with the purchase of the drugs he, the witness, would be transporting; and that he (*i.e.*, Matthews) was indeed the person to whom he would be delivering these drugs to in Cleveland?

Surely the Courts' trivialization of this evidence can no more survive meaningful scrutiny than counsel's personal assurances that Quintana had been "brutally honest" in testimony the Government fully endorsed as being worthy of belief.

Also significant here are the following condemnatory remarks of the District Court dealing with its assessment of the testimony provided by "Quintana," the Government's prime witness. In the Court's version, which arguably was *the* version fully credited by the jury, Quintana had testified that he met Guzman prior to loading his tractor-trailer at a truck stop in Arizona. Assertedly (and this is worth repeating) it was at this meeting Quintana had convincingly, albeit falsely, sworn Guzman, the drug supplier, had introduced him to Matthews. He then swore that the very next day the vehicle was loaded, and the day after that he left for Cleveland arriving the following day, *i.e.*, Easter Sunday (**Appendix "B," pp. 31a-32a**). Also see **Tr., pp. 410-420**.

While the above itinerary shows Quintana's admitted involvement with these drugs on the surface seems plausible enough, it is of interest here that certain unchallenged time-lines are critical to this appeal. Indeed, in denying the "Motion to Suppress," the Court made various critical findings that arguably cannot be reconciled with the Court's ultimate thesis Here it was stated: "the Court is mindful of the potentially strong impact of eyewitness identification at trial." (**Appendix "C," p. 62a**.) Taking the Court at its word, when it conceded that the Matthews identification was a critical issue in this case (as it surely was) the question then is: How could the Court nonetheless trivialize, as it did, the compelling

importance *to the jury* of the identification testimony of this witness? And, do so indeed with impunity?

For our part, there is simply no way it can ever be said that Quintana's powerful and overwhelming testimony regarding Matthews had no effect whatsoever on the jury's decision to convict. Indeed, given the Court's findings that the considerable testimony supplied the jury by the Government's chief witness was false, it cannot even be assumed that the jury excluded this evidence from its ratiocinations and (even worse) that this witness' evidence had absolutely no effect on the jury's verdict. To believe this is so can be likened to believing in the tooth fairy.

ARGUMENT NO. II:

A NEW TRIAL IS REQUIRED WHERE IT IS HIGHLY PROBABLE THAT INDISPUTABLY FALSE AND OTHERWISE FLAWED EVIDENCE INFLUENCED THE VERDICT.

In judging the possible impact of Quintana's testimony on the jury, certain facts of consequence emerge. These we fully contend inexorably lead to the conclusion that the verdict in this case was constitutionally unfair. See District Court's Opinion (**Appendix "B," pp. 34a-36a**). In our specific references here it is significant that the Court tells us Quintana could not be certain, because he was "not sure about any dates," *whether it was on March 13th , 14th , or 15th that he met the Appellant*, or which of these dates his truck was loaded with its illegal cargo (**tr., pp. 451-454**). The upshot of the point there made, augmented as it was by other factors that likewise

must be reckoned with, is that this reasoning pattern thoroughly confutes the District Court's asserted basis for denying a new trial. On the other hand, one thing at least is certain. As forecasted, Quintana provided the Government with its theory of how these drugs got into the Cleveland area, and who he asserted he was delivering them to. According to Quintana (a thesis wholeheartedly endorsed by the Government) it was on one of these dates that he was introduced to the person he identified as Matthews by this Guzman at a "truck stop" in Tucson. (**Tr., pp. 412-415**.) Also, it is clear that it was the very "next day" (after this Tucson meeting) that he left his semi-tractor trailer with Guzman to be loaded. And, it was the "next day" that he headed for Cleveland (**id., p. 419**). The fact that the Court actually endorses this time-line becomes all the more important in the wake of its later characterization of Quintana as a perjurer in all these respects. These include his identification of Matthews as the man he met in Arizona with Guzman. (**Tr., pp. 177-182**.)

The above analysis becomes even more compelling, in Matthews' favor, when one realizes the impact had on the jury when it was shown that Quintana was debriefed (arguably within hours after he left Arizona with his load) two days before the time of his arrival in Cleveland. What he told the agents who arrested him in Kansas, which was only a day after he left Arizona, amplifies the flawed investigation conducted by these agents. The fact that the arrest here occurred on March 27, 2005, clearly magnifies the significance of the defense proof that showed Matthews could not have been the person identified by the Government as the purchaser of these drugs and as the person to whom they were being delivered.

Likewise significant here is what the Court wrote with reference to Quintana's *false testimony*. Specifically, it was said:

> *. . . the newly discovered evidence is relevant in two significant respects: (1) it demonstrates that Quintana could not have met with Matthews on March 15, 2005 as he was in Cleveland, Ohio*; and (2) Quintana's presence in Cleveland, Ohio in March 2005 (and most likely February) provides corroboration to Jackson's claim that he washed Quintana's semi-tractor trailer in March 2005. . . . *The Court is faced with a Government witness that by any reasonable interpretation of the current records before the Court presented false testimony.*[2]

Appendix "B," at p. 55a. (*Emphasis supplied.*)

Of course, what may have influenced the jury cannot be as easily characterized as the Court would do it. This is especially so since the Government has never retreated, even slightly, from its original thesis. It continues to entail the prosecutor's enthusiastic extolment of Quintana's credibility and the credit worthiness of his evidence. Be all that as it may, one has to wonder, how could the District Court also believe - - as he said he did, that Quintana's testimony was not even slightly credited by the jury? (**Id., pp.**

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[2] One reading this compelling quote, especially the emphasized segment, can only wonder what happened to the belief (forged by *this* Court) that where, as here, false testimony is presented to the jury, a conviction must be set aside if there is a reasonable likelihood "that the false testimony affected the verdict." See ***Kyles v. Whitley*, 514 U.S. 419, at fn. 7 (1995).**

55a-56a.) Granted, the Court's conclusion that the "newly discovered evidence undeniably strikes at the heart of the credibility of Quintana's entire testimony" (**ibid**) is beyond dispute. Yet, it is this inconfutable fact that shows clearly the Court truly lost its focus *after* taking the position that Quintana was not worthy of belief - - as it did. Indeed, if it were otherwise, there is no way the Court could have possibly ignored the fact that counsel-opposite had improperly emphasized, to the praiseworthy degree as she did, the testimony of Quintana in her perorations. Here, of course, the facts show, she fully credited Quintana as being "brutally honest" (**id., p. 482**).

Clearly, counsel sought to exploit, by these "foul blows," her prestige and that of her office with the jury. See ***Berger v. United States*, 295 U.S. 78 (1938)**. In our judgment, she succeeded. See ***United States v. Modica*, 663 F.2d 1173, at 1178-1179 (2nd Cir. 1980)**. How then could these Courts ignore this unassailable fact?

ARGUMENT NO. III:

A NEW TRIAL IS WARRANTED BY THE DISCOVERY, POST-TRIAL, THAT FALSE TESTIMONY WAS PROVIDED BY A MOST CRUCIAL, INDEED INDISPENSABLE, PROSECUTION WITNESS WHERE THE VERDICT COULD VERY WELL HAVE BEEN BASED ON DISBELIEF OF DEFENSE EVIDENCE.

With reference to the trial Court's rejections of the defense's sufficiency of the evidence contentions, repeatedly made in this case (*i.e*, in the Motions for

Judgment of Acquittal made during the trial under favor of Rule 29[A] and 29[B], and in the post-verdict submissions on this same issue), the contention is also being made that the witness Quintana's testimony cannot even possibly be regarded as harmless as the Courts below would do with it. This is especially so given counsel's very serious efforts to bolster Quintana's testimony for the jury with her vouchment-laden oratory. (See **Tr., pp. 482-483**.)

With this being so, counsel is truly perplexed, as this Court surely will be once it credits the District Court's categorical findings concerning his *earlier* assessments of the compelling worth of Quintana's identification evidence to the Government's case. See **Appendix "B,"** ***infra*****, at p. 57a**. This follows because there is simply no way anyone, even a federal Judge, could rationally conclude this jury was simply not influenced to convict on the basis of Quintana's testimony augmented, as it surely was, by the jury's concomitant rejection of the defense's evidence. This follows because the considerable defense evidence was offered to show Matthews could not possibly have been the person Quintana supposedly met in Tucson. And, Matthews could not have been the person to whom Quintana understood (before he left Arizona) he would be delivering the drugs to in Cleveland (***ante*****, pp. 5-6**). Who then can say the defense evidence would not have been credited if the jury had known the Government's chief witness was outright lying about having been with Matthews in Arizona - - as he testified.

Given this same Court was later convinced by the efficacy of the newly discovered evidence, which he fully credited (***post*****, p. 20**), how then could the Court

be so sure the jury would not have acquitted if they had disbelieved the witness (to the same degree it seems clear the District Court says it disbelieved him). For our part, the metaphysical acumen that enables this trial Judge to proclaim that Ernest Matthews would have still been convicted even if the jury had disbelieved Quintana's identification of him (as the person introduced to him in Arizona and to whom the drugs were to be delivered) is far too abstract to be of any practical use. Also, for our part as well, the fact that the Court branded Quintana's testimony as false (*i.e.*, perjurous), casts an impregnable barrier to any of its segments being credited as proof of guilt - - indeed even slightly. This follows because his evidence was not merely exceedingly improbable, its endorsement by the Government even in its Appellate arguments is, and was, truly unacceptable. Indeed, this is so for still other reasons that were likewise called to the District Court's attention.

Indeed, in "**Defendant Matthews' Post-Hearing Brief**," this was said:

> Moreover, the testimony of Agent Leppla and Officer Ansari did not match. Agent Leppla testified that the Trailblazer was close to the garage door and the Suburban was closer to the tractor-trailer, while Officer Ansari testified that it was the other way around. Moreover, Agent Ansari testified that another tractor-trailer and pick-up truck arrived just before the delivery, while Agent Leppla stated that no other vehicles were in the area. *In addition, Officer Ansari testified that he saw the Defendants run when the police approached them, while Agent Leppla said they did not run.*

> Finally, both Agent Leppla and Officer Ansari stated that the Defendant Matthews was wearing beige pants at the time he was there, when in actuality, the pictures of the Defendant's clothes . . . when he was arrested were blue.
>
> The Defendant provided credible and sufficient evidence to explain what the Defendants were doing at the scene. They were there to clean the Defendant Matthews' aunt's vehicle and the Defendant Jackson operated a mobile wash business from the premises. Moreover, Defendant Jackson's former employee, Mr. Robitson, testified that he had seen Mr. Quintana's truck before, and had in fact washed it at the shop. . . . Mr. Robitson testified that he washed the truck in question in March of 2005. . . . This testimony of Mr. Robitson, would have seemed more credible to the Jury if they had known that Mr. Quintana was in fact in Cleveland during a number of days in March 2005, contrary to his testimony.

See **Id., pp. 8-9**. The upshot of the above quote is that it exposes the trial Court's refusal to set aside this verdict as truly being indefensible. This is especially so since the trial Court, despite its open and detailed assailment of Quintana's testimony (**tr., pp. 178-182**), augmented by what the Court regarded as "Quintana's false testimony" (**ibid**), would literally tax our credulity to the extent his dispositive resolutions do.

What is most obvious here is that the Court would ignore the thrust of his well-supported findings that Quintana gave materially false testimony (*i.e.*, he had

a conscious intention of distorting the truth) concerning Matthews. Clearly, and undeniably, this fact alone perforce provided (a) a basis for discrediting everything he said, and (b) a reason to question his motivations. The fact that despite all this the Court would nonetheless rely on things said by him to reach the conclusion our Petitioner was not victimized is all the more baffling

Now, we are keenly aware that these Courts were likewise "bound to make all reasonable inferences and credibility choices in support of the jury's verdict." ***United States v. Johnson*, 440 F.3d 832, at 839 (6th Cir. 2006)**. However, contrary to the efficacy of the above tenet, our belief is this case falls outside the ambit of the thrust provided by the tenet cited above. This follows because of the trial Court's characterization of the Government's chief witness. whose credibility was lauded, indeed heavily endorsed (and actually applauded) by the prosecutor in her compellingly persuasive perorations to the jury. In so doing, as shown above, the jury heard her characterize this witness as being "brutally honest" (**tr., pp. 483-484 & 485**). And, they heard her praise him for not having equivocated. (**Ibid.**) The fact that the Government, in its Appellate Brief, failed to accept the rejection by the District Court of Quintana's testimony, is likewise as indefensible as it is baffling.

Obviously, the Court's ability to yield to the conclusion that Quintana's testimony could be relegated to a sort of cannon-fodder status deserves considerable assayment. For surely, more was required of the Courts below than for them to simply say that's our opinion and then show they were sticking with it - - come hell, or high water.

Now, we are aware the trial Court *sua sponte* advised the jury, in so many words, that the prosecutor was out of line when she made those statements about their chief witness having been "brutally honest" and the like, and in otherwise vouching for the witness' credibility. (**Tr., pp. 482-485**.) On the other hand, any conclusion that this testimony had no impact whatsoever on the jury, in addition to being farfetched, is unrealistic.

We were reminded (the Court was told) of the statement made by one of this counsel's all time favorite Judges, in one of his all time favorite cases. There, the wise Judge wrote: "It must be remembered that after the saber thrust, the withdrawal of the saber still leaves the wound." ***United States v. Rudolph*, 403 F.2d 805, at 807 (6th Cir. 1968)**. The point here being that there is simply no way anyone can say this jury (despite having so egregiously been poisoned) would have reached the same verdict in this case had it been aware, *as the Judge was*, that the Government's case was so thoroughly flawed - - as it was. So postured, how can it be said by these Judges that the jury would not have voted differently if they had known the Government's case was bottomed on lies?

ARGUMENT NO. IV:

A VERDICT THAT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE - - THAT IS, CONTRARY TO THE WEIGHT OF THE CREDIBLE EVIDENCE, WARRANTS THE GRANTING OF A NEW TRIAL.

Here, the law is clear enough. In making a determination as to whether to grant a Motion on the grounds that the verdict is contrary to the weight of the evidence, the Court should do so where (as here) the evidence preponderates so sufficiently heavy against the verdict that a miscarriage of justice may very well have occurred. Indeed, in these circumstances, we are convinced the Court need not view the evidence in the light most favorable to the verdict. Rather, the Court should do what this trial Judge actually did - - that is, he weighed the evidence for himself and in so doing he also evaluated the credibility of the witnesses. Simply put, this Court, in making its own evaluation, although admittedly in the light of the new evidence, reached the right conclusion - - that is, the Government's chief witness was not worthy of being believed.

Here the points to be understood include the fact that the trial Judge, whose assessment of new evidence and the credibility of witnesses is almost impervious to any defense challenge, made the determination that the Government's most central witness could not be believed. In other words, the Judge declared *he should not have been believed by the jury*. Now, we fully concur that position renders it the law of this case. With this being so, we fully subscribe

to the view that the Appeals Court, in reviewing the lower Court's rulings (based on the newly discovered evidence), owed no deference to the trial Judge's *legal conclusion* that without this witness' testimony the verdict would still have been guilty. Cf., ***United States v. Perdomo*, 929 F.2d 967, at 969-970 (3rd Cir. 1991)**. Also see ***United States v. Kirk*, 935 F.2d 932, at 934-935 (8th Cir. 1991)**, which likewise holds that unlike conclusions of fact, no deference is owed to the District Court's conclusions of law.

We further contended there, and do so here, that the trial Judge's analysis as to the effect of the false evidence was further flawed by his effort to restrict his assailment of the witness' flawed testimony to his credibility. **(Appendix "B," pp. 56a-57a.)** In our view, this clearly is wrong. This follows because the Court's well-supported finding that the witness gave materially false testimony concerning Matthews was for sure quite extensive. Indeed, it was indisputably and compellingly convincing. With this being so, it perforce must be credited with causing the jury to reject (as it inferentially did) the defense's considerable evidence. This fact also provided a formidable basis for amplifying the verity of the other prosecution witnesses. This follows because, arguably at least, some of these witnesses embellished their testimony in the wake of the Government's wholesale endorsements of Quintana's "false" evidence, because they knew he would be believed by the jury. And, of course, the Court had to know the references in the Government's opening statements to certain of these defense witnesses, as well as those in her summations, defy being trivialized. Yet, this is what the District Court and the Sixth Circuit obviously did.

ARGUMENT NO. V:

A NEW TRIAL, IF NOT A JUDGMENT OF ACQUITTAL, IS WARRANTED BY THE POST-TRIAL DISCOVERY OF PROOF THE GOVERNMENT'S CHIEF WITNESS PROVIDED FALSE TESTIMONY AND COUNSEL FOR THE GOVERNMENT NOT ONLY VOUCHED FOR THIS WITNESS' CREDIBILITY, BUT ASSURED THE JURY HE HAD BEEN "BRUTALLY HONEST".

Under **Rule 33, Rules of Criminal Procedure**, a District Court may grant a new trial "if required in the interest of justice." Here, Petitioner has the benefit of several insuperable judicial findings relative to the newly discovered evidence. Indeed, as shown elsewhere, the Government's chief witness' testimony had been found by the Court to be false. This finding the Court made while fully advised as to the Government's indisputable reliance on this testimony. Proof this is so one gets from an appreciation of the extent his evidence was centralized in the Government's opening statements (**tr., p. 185**), in its trial presentation, and in its summations during which counsel referred to the witness as having been "brutally honest" (**tr., pp. 483-484**), and for that reason he should be believed - - and they should convict.

The Court, arguably with an awareness that the grant of a new trial would be tantamount to an acquittal, somehow was able to oraculate that the "new evidence was merely cumulative" (**tr., p. 180**). Likewise ignored in this dubious resolution, painted by the Court in its *ad hoc* (so far as we are concerned)

thesis, is the irrepressible fact that a new trial is truly warranted here. Simply put, the new evidence supported the defense's evidence that the witness had willfully falsified his identification of the Defendant. This follows, all the moreso, because there is simply no way anyone can exclude the contention that our Petitioner's conviction rested on the jury's disbelief of his witnesses sworn testimony. It follows, as we disagree, as did the Sixth Circuit (at least as we read their Opinion), that the inquiry here comes down to whether, absent the false evidence provided by the Government's chief witness, it is possible, indeed probable, that honest and fair minded jurors might very well have found Ernest Matthews not guilty.

Consider as relevant to our thesis here ***United States v. Young*, 17 F.3d 1201 (9th Cir. 1994)**. There it was held a new trial was warranted because clearly a new trial could probably have produced a different result. The same is true here. If it is not, who can say this with impunity?

Also (as indicated above) the Court here, despite finding, as it did, that Quintana's testimony could not survive the newly discovered evidence, failed to reckon with the fact that this proof totally decimated the entirety of his credibility. Yet, the Court, in an awesome feat of mental gymnastics convinced himself this proof did "not undermine the verdict" (**Appendix "B," pp. 56a-57a**). What the Court seemed clearly not to understand, or if he did he failed to so indicate, is that this verdict should also be set aside because clearly and undeniably there was a "reasonable likelihood that the false testimony *could have* affected the jury verdict." ***United States v. Bagley*, 473 U.S. 667, at 678-680 (1976)**. (*Emphasis supplied.*)

In our view, indeed, hopefully in the Court's view as well, clearly and indisputably, here there is a reasonable likelihood that the false evidence provided by this witness adversely affected the verdict. For this reason alone, our belief is that it must be set aside. **Ibid**. This result should be reached all the moreso because of the simple awareness that there is clearly no way it can be assumed that despite the prosecutor's touting of their chief witness as having (in her judgment) been "brutally honest," the jury did not even slightly weigh his evidence against those on trial - - who were convicted in the wake of this prosecution.

CONCLUSION

No one, except perhaps people who are really prosecution oriented, would deny the Government's case here would have been substantially weaker if Quintana had not testified, or if the jurors had heard the evidence that convinced the Court he was a perjurer. Indeed, no one can dispute that what the Government told the jury was fully crafted to persuade them to convict. So, how then can it be said that this oratory had no effect? Hopefully this Court will agree with us that this is so.

Quintana's testimony, no matter how one looks at it, was so overwhelming it would have been difficult for the jury not to have factored it into its decision. Indeed, even if the jury had been instructed to do so, there is no way that could have happened. No one can possibly dispute that the prosecutor's success often depends on the Government's counsel's ability to convince the jury of a particular witness' credibility.

The bottom line here is that there is really no way it can be said that Ernest Matthews was not cumulatively prejudiced by the false identification testimony of the witness Quintana, the jury's rejection of the defense's evidence, counsel-opposite's fervent endorsement of this credibility and his evidence. This is especially so since the Appeals Court and the District Court literally overlooked, and indeed failed to credit, the following categorical findings made by the District Court in the wake of the newly discovered evidence. Indeed, it was here the District Court wrote, in irrepressible prose (at least we so thought) that, as the Defendant suggested, Quintana's trial testimony, on its face was inherently lacking in credibility. **Appendix "B," at p. 56a**. And, as discussed, ***supra***, Quintana's testimony regarding his alleged meeting with Guzman and Matthews was lacking in credibility and was subject to little, if any, weight by the jury. **Id., p. 57a**. Given no one can possibly say the evidence, apart from Quintana's testimony, was overwhelming, to say as these Courts must by saying, it was sufficient not only to overcome the defense evidence but to prove guilt beyond a reasonable doubt, can be likened to saying that Matthews' apparent association with his co-defendant was sufficient to prove him guilty (if this person was guilty) on a guilt by association theory.

Surely something has to be wrong with this scenario. Here, it is worth repeating, while the Sixth Circuit, in reaching its conclusions, arguably would simply ignore (as it did) the amplificatory effect of counsel-opposite's having vouched for the formidability of the Government's case, and the integrity of its chief witness as having been "brutally honest," one thing seems clear enough. Counsel's statements "so infected

the trial with unfairness as to make the resulting conviction a denial of due process." See ***Donnelly v. DeChristoforo*, 416 U.S. 637, at 643 (1974)**.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3135

[Filed October 21, 2008]

UNITED STATES OF AMERICA *Plaintiff-Appellee*,	)
v.	)
ERNEST MATTHEWS *Defendant Appellant*.	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

OPINION

BEFORE: COLE and GIBBONS, Circuit Judges; FORESTER, District Judge.*

* The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

COLE, Circuit Judge. Defendant-Appellant Ernest Matthews was convicted of attempting to possess with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B) and § 846. On appeal, Matthews argues that (1) the trial evidence was insufficient to sustain his conviction, entitling him to a judgment of acquittal under Rule 29(c)of the Federal Rules of Criminal Procedure, and (2) a new trial is warranted based on newly discovered evidence and in the interest of justice. For reasons set forth below, we **AFFIRM** Matthews's conviction and the district court's denial of his motion for a new trial.

I. BACKGROUND

Matthews was tried and convicted of a single-count charge of attempting to possess with intent to distribute 100 kilograms or more of marijuana.

The following evidence was introduced at trial. On March 26, 2005, the Kansas State Highway Patrol stopped a semi-tractor-trailer near Kansas City because the registration number displayed on the truck's door had an extra digit. The truck had a flat bed that was loaded with sheets of housing insulation covered by tarps. The police became suspicious and asked the driver, Arnulfo Quintana, to follow them to a police station so a drug-detection dog could search the truck. At the station, Quintana told the officers that marijuana was hidden in the insulation in a certain pallet of the truck's load. There, the officers discovered thirty-nine bales of marijuana, weighing 749 pounds.

Quintana testified that an individual named Martin Guzman had proposed that Quintana haul a load of marijuana to Cleveland, Ohio in exchange for $25,000. Quintana spoke to Guzman about the proposition several times, including once at a truck stop near Tuscon, Arizona. Quintana was inconsistent about the date of the truck-stop meeting, but sometime around March 15 or 16 he dropped off an empty flat-bed tractor-trailer at a location specified by Guzman. When Quintana returned a day later, the trailer had been loaded with the insulation sheets and the marijuana. Quintana admitted that he had been using crystal methamphetamine around the time of his truck-stop meeting with Guzman.

After being stopped by the Kansas State Highway Patrol, Quintana agreed to serve as a cooperating witness and to continue with the load and make a controlled delivery. Accordingly, Quintana, accompanied by Kansas City task force officers, continued overnight on his planned route to Cleveland. Once in Cleveland the following day, Quintana and the Kansas officers went to the Cleveland Drug Enforcement Agency ("DEA") office where DEA officers equipped Quintana with a recording device. Quintana then drove the tractor-trailer alone to the delivery destination, with close police surveillance.

Meanwhile, personnel at the Cleveland DEA contacted DEA Special Agent William Leppla late on March 26 or early on March 27 to advise him of the impending delivery of marijuana. Leppla was told the delivery would occur on March 27 somewhere on Aurora Road in Warrensville Heights, a suburb of Cleveland, near a warehouse marked by a parked brown tractor-trailer. The DEA remained in contact

with the Kansas officials accompanying Quintana and kept Leppla informed of the progress of the controlled delivery. Leppla and other agents proceeded to the Aurora Road location and, by a process of elimination, determined that the delivery point was a warehouse, subdivided into garages. Leppla had been in and around the area beginning at 11:00 a.m. on March 27. He met with Task Force Officer Jamaal Ansari around 6:00 p.m., and they took settled positions at 6:30 p.m. Leppla testified that during the time he was surveying the area, there was virtually no traffic on the street because it was Easter Sunday.

Leppla testified that at about 6:40 p.m., two vehicles—a two-tone Chevrolet Suburban followed by a black Chevrolet Trailblazer, each driven by a black male and containing no other passengers—pulled up to a garage door at the warehouse. Leppla stated that the driver of the Suburban, whom he later identified as Matthews, exited the vehicle, entered the warehouse through a "man door," and then pulled up the garage door from the inside. The two men then pulled the vehicles into the garage, stood outside the garage for several minutes, returned to their vehicles, backed them out of the garage, shut the door, and left. Leppla testified at trial that the entire visit lasted about fifteen minutes, although this was inconsistent with his testimony at the suppression hearing that they had stayed for about twenty-six minutes.

At approximately 7:10 p.m., Quintana arrived at the garage, driving the tractor-trailer. Minutes later, the Trailblazer and Suburban reappeared. Leppla testified that they were driven by the same men who had departed minutes earlier. Matthews, the driver of the Suburban, again opened the garage door. He met

briefly with Quintana and the driver of the Trailblazer, later identified as Matthews's co-defendant Edward Jackson, then entered the garage out of Leppla's sight. Jackson climbed onto the bed of the tractor-trailer and, with Quintana's assistance, began loosening the canvas straps of the pallet containing the marijuana. The wire Quintana was wearing recorded Jackson saying something about "doing it right here." (Trial Tr. vol. 2, 425, Sept. 14, 2005, Joint Appendix ("JA") 321.) Quintana testified that Jackson was referring to unloading the marijuana. At this point, Leppla became concerned about the officers' safety because it was getting dark outside, so he contacted his supervisor at the DEA for approval to make the arrests. Approval was given, and more than six officers emerged from hiding, identified themselves as officers, and arrested Quintana, Matthews, and Jackson. A search of Matthews revealed approximately $3200 in cash, and the officers found approximately $500 in cash on the floor near where they had arrested him. The Trailblazer contained rental car papers, gallon-sized plastic baggies, and rolls of contact paper.

After the arrest, the police searched Matthews's house and learned that he had flown to Las Vegas, Nevada in March. The parties entered a stipulation that Matthews had departed Cleveland, Ohio on an America West Airlines flight on March 1, 2005, for Las Vegas, Nevada. The stipulation further provided that on March 13, 2005, Matthews had departed Las Vegas, Nevada on an America West Airlines flight, arriving in Cleveland in the early morning hours of March 14, 2005.

After the police learned that Matthews had traveled to Las Vegas, Quintana told the police that he recognized Matthews from his mid-March meeting with Guzman at the truck stop outside of Tuscon, Arizona. He stated that at this meeting, Guzman had introduced Matthews as "the boss and the person [he] would be delivering the marijuana to." (Trial Tr. vol. 2, 459, JA 344.) He stated that he had not seen Matthews clearly at the meeting because Matthews had remained in the passenger seat of Guzman's car while Quintana and Guzman discussed the deal. He further testified that "all the black people look the same, and [he] wasn't paying much attention," (Trial Tr. vol. 2, 463, JA 348), but that he understood that the man in the passenger seat was the one who would be waiting for him in Cleveland, and that Matthews was one of the two people he had seen on the day of the delivery. He also stated that he had only been to Cleveland one other time, in January 2005, to have a truck repaired.

Leppla testified that, based on his training and experience, the baggies and contact paper found in the Trailblazer were of a type often used by drug dealers to package large quantities of marijuana. In addition, he testified that it was not unusual to find only $3200 in Matthews's possession—an amount far too small to pay for the amount of marijuana delivered—because traffickers generally avoid having drugs and money at the same location during a drug deal.

At the close of the Government's case, Matthews moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, arguing that the evidence, taken in the light most favorable to the Government, was insufficient to allow a rational jury to find beyond a reasonable doubt the essential

elements of the crime charged. Matthews pointed to Leppla's contradictory testimony about the length of time the two individuals had been in the garage during their first appearance at the warehouse and to the unreliability of Quintana's testimony, given his uncertainty about dates and his admission to using drugs around the time of his meeting with Guzman. The district court denied the motion, and Matthews thereupon presented his case.

Matthews introduced several witnesses who testified to the following: Matthews traveled to Las Vegas, Nevada on March 1, 2005, to Tucson, Arizona from March 7 through March 9 so that his girlfriend could interview for a job, and then back to Cleveland on March 14; during this trip, Matthews did not meet with anyone at a truck stop; Quintana had possibly been to the warehouse on Aurora Road before to have his truck washed; Matthews's aunt rented the Trailblazer and owned the contact paper and baggies; Matthews's aunt prepared an dinner on Easter Sunday at which Matthews and Jackson were present; Mathews's aunt asked Matthews and Jackson to take the Trailblazer to be washed at the warehouse because it was due to be returned the following day; the Suburban was owned by a friend named Dartanyan Thompson; and Thompson had accompanied Jackson to the warehouse initially to look at some motorcycle parts, while Matthews had only been present for the second trip to the warehouse, for which he had borrowed Thompson's Suburban. Matthews's co-defendant, Jackson, asserted a theory that after being arrested in Kansas, Quintana had decided to conceal the true destination of the marijuana and lead police to the warehouse in Cleveland where he had previously had his truck washed.

The jury returned a guilty verdict, and the district court sentenced Matthews to 120 months of imprisonment. Matthews timely appealed.

ANALYSIS

Matthews essentially asserts two claims on appeal: (1) the district court erred in denying his motion for judgment of acquittal because the evidence was insufficient to support a conviction, and (2) the district court abused its discretion in denying his motion for a new trial based on newly discovered evidence that Quintana gave false testimony.

A. Motion for Judgment of Acquittal

1. Standard of Review

"This court reviews de novo a denial of a motion for judgment of acquittal, but affirms the decision if the evidence, viewed in the light most favorable to the government, would allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt." *United States v. Solorio*, 337 F.3d 580, 588 (6th Cir. 2003) (internal quotation marks omitted); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (when considering sufficiency of evidence to sustain a conviction on direct appeal, the "relevant question" is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). Because the issue is one of legal sufficiency, the court "neither independently weighs the evidence, nor judges the credibility of witnesses who testified at trial." *United States v. Talley*, 164 F.3d 989, 996 (6th Cir. 1999). An appellate court cannot substitute its judgment for that of the jury. *United States v. Hilliard*,

11 F.3d 618, 620 (6th Cir. 1993). "[C]ircumstantial evidence alone can sustain a guilty verdict and . . . [such] evidence need *not* remove every reasonable hypothesis except that of guilt." *United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984). This standard is a great obstacle to overcome, *United States v. Winkle*, 477 F.3d 407, 413 (6th Cir. 2007), and presents the appellant in a criminal case with a very heavy burden, *United States v. Jackson*, 473 F.3d 660, 669 (6th Cir. 2007).

2. Merits

Matthews asserts that he was entitled to a judgment of acquittal pursuant to Rule 29(c) because the Government's proof at trial established nothing more than Matthews's presence at the delivery scene, which is inadequate to support his conviction of attempted possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and § 846. The district court denied the motion, finding that the evidence introduced at trial was sufficient for a rational finder of fact to conclude that the elements of the offense had been proven beyond a reasonable doubt.

"The elements of a charge of possession with intent to distribute illegal drugs are (1) the defendant knowingly; (2) possessed a controlled substance; (3) with intent to distribute." *United States v. Jackson*, 55 F.3d 1219, 1225 (6th Cir. 1995). To obtain a conviction for an attempt crime, "the government must demonstrate a defendant's intent to commit the proscribed criminal conduct together with the commission of an overt act that constitutes a substantial step towards commission of the proscribed

criminal activity." *United States v. Bilderbeck*, 163 F.3d 971, 975 (6th Cir. 1999). After consideration of the evidence introduced at trial in this case, we cannot say that no rational trier of fact could have found these elements beyond a reasonable doubt.

It was undisputed at trial that a flat-bed trailer hauling more than 700 pounds of marijuana arrived at Jackson's garage on Easter Sunday, March 27, 2005. Two officers testified that Jackson and Matthews appeared at the garage briefly and then left several minutes before Quintana arrived. It is undisputed that, minutes after Quintana arrived, Matthews and Jackson appeared at the garage and spoke with Quintana. Leppla testified that after the truck pulled in, Jackson began to assist Quintana with the removal of the straps from the area of the trailer that contained the marijuana. Although the recording from the wire worn by Quintana does not contain explicit discussion of drugs, Jackson mentioned "doing it right here," and Quintana testified that Jackson was referring to unloading the marijuana. It is undisputed that Matthews had approximately $3200 in cash on his person when he was arrested, and another $500 in cash was found on the ground near where he was arrested. Leppla testified as an expert in drug trafficking that the items seized after searching the vehicles were consistent with the packaging of marijuana for sale. Finally, the Government presented Quintana's testimony suggesting that Matthews had met earlier in Arizona with Guzman, the alleged source of the marijuana.

Taking this evidence in the light most favorable to the Government, as we must, a rational juror could conclude beyond a reasonable doubt that Matthews

intended to receive the marijuana. Based on the large quantity of marijuana and the fact that there were baggies and contact paper in the car, a jury could conclude beyond a reasonable doubt that Matthews intended to distribute the marijuana. Matthews points to discrepancies in several of the witnesses's testimony, such as Leppla's and Ansari's differing recollections as to which vehicle—the Suburban or the Trailblazer—pulled into the garage first. But, as the district court accurately noted, these distinctions relate to credibility and Matthews addressed them thoroughly during cross-examination. Because this Court is prohibited from independently weighing the evidence or judging the credibility of witnesses, *see Talley*, 164 F.3d at 996, Matthews's arguments fail. There was sufficient evidence presented at trial to support Matthews's conviction, and the district court did not err in denying his motion for judgment of acquittal.

B. Motion for a New Trial

1. Standard of Review

Federal Rule of Criminal Procedure 33(a) provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." When faced with a Rule 33 motion, unlike a motion for judgment of acquittal under Rule 29, the district court may weigh the evidence and assess the credibility of the witnesses; "[i]t has often been said that [the trial judge] sits as a thirteenth juror" when considering a Rule 33 motion. *United States v. Solorio*, 337 F.3d at 589 n.6 (quotation marks and citation omitted). When reviewing the district court's decision to deny a motion for a new trial

based on newly discovered evidence, this Court may only decide whether the district court's determination constitutes an abuse of discretion. *United States v. Jones*, 399 F.3d 640, 647 (6th Cir. 2005); *see also United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986) ("Motions for a new trial based on newly discovered evidence are disfavored, and a trial court's determination that a new trial is not warranted will not be reversed absent 'clear abuse of discretion.'" (quoting *United States v. Allen*, 748 F.2d 334, 337 (6th Cir. 1984) (per curiam))).

2. Merits

After the jury found him guilty, Matthews moved for a new trial claiming he had discovered new evidence proving that Quintana had given false testimony. The motion was supported by hotel reservation confirmations, credit card receipts, and expert handwriting analyses demonstrating that Quintana had stayed at a hotel near Cleveland from March 13, 2005 through March 17, 2005. The district court summarized the relevance of the evidence as follows:

> Quintana testified that he had visited Cleveland, Ohio in January 2005 to have a truck repaired. He further testified that he had not visited Cleveland at any other time prior to the arrest. Moreover, Quintana testified that he met Matthews in [Tucson in] mid-March 2005 (specifically March 15, although he was unsure regarding the exact date) and the semi-tractor trailer was loaded with marijuana the following day . . . . Beyond damaging the credibility of Quintana's entire testimony, the newly

> discovered evidence is relevant in two significant respects: (1) it demonstrates that Quintana could not have met with Matthews on March 15, 2005 [in Tucson] as [Quintana] was in Cleveland, Ohio; and (2) Quintana's presence in Cleveland, Ohio in March 2005 . . . provides corroboration to Jackson's claim that he washed Quintana's semi-tractor trailer in March, 2005.

(Mem. Op. and Order, Oct. 23, 2006, JA 178-79.) Despite concluding that Quintana had presented false testimony, the district court denied Matthews's motion for a new trial, finding that the newly discovered evidence was largely cumulative and impeaching and that it would not have impacted the outcome of the trial.

To warrant a new trial on the basis of newly discovered evidence, Matthews must demonstrate that "(1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal." *Jones*, 399 F.3d at 648 (citing *O'Dell*, 805 F.2d at 640). Although the evidence of Quintana's mid-March stay in Cleveland was not discovered until after trial, Matthews fails to meet the three other requirements for a new trial. While Quintana's name was not provided to defense counsel until trial, there is no evidence that Matthews was surprised that the Government called Quintana as a witness. Matthews observed Quintana at the time of the arrest, and Quintana was mentioned in the prosecution's opening statement, yet Matthews did not request a continuance or trial subpoena to seek the evidence that was later discovered. Moreover, other

evidence indicates that prior to trial, defendants knew that Quintana had previously stayed in a hotel in Cleveland. Thus, Matthews has not established that the newly discovered evidence could not have been discovered with due diligence prior to trial.

Further, the district court concluded that the newly discovered evidence was merely cumulative and impeaching. The district court found, and the record reflects, that defense counsel had already "fatally damaged" Quintana's credibility during trial. (Mem. Op. and Order, Oct. 23, 2006, JA 180.) Quintana was shown to be unable to recall dates and unable to remember that Matthews had large, visible scars on his face. He stated that "all the black people look the same" to him, (Trial Tr. vol. 2, 463, JA 348), that he was using drugs at the time of the events at issue, and that he hoped for leniency from the Government in exchange for his cooperation. Accordingly, to the extent that the new evidence would have contradicted Quintana's testimony, the district judge did not abuse his discretion in finding that such evidence would merely have been cumulative and impeaching.

Matthews has also failed to show that the newly discovered evidence would likely have resulted in an acquittal. The district court concluded that even if all portions of Quintana's testimony, except those that are undisputed, were removed from the record, there would still be sufficient evidence to convict Matthews. As recounted above, there is no dispute that Quintana was apprehended with a load of marijuana and that he indicated Jackson's garage as the delivery location. There is no dispute that minutes after Quintana arrived at the warehouse on Easter Sunday, Matthews and Jackson arrived and spoke with Quintana. There

is no dispute that one of the vehicles in which Matthews and Jackson arrived contained materials commonly used for packaging marijuana. There is no dispute that Matthews had approximately $3200 on his person at the time of his arrest and that another $500 was found on the floor near where he was arrested. Agent Leppla testified that Jackson climbed onto the truck and began to undo the straps where the marijuana was hidden, saying something about "doing it right here." Based on this evidence, nearly all of which is undisputed, the district court did not abuse its discretion in concluding that the newly discovered evidence would not have resulted in an acquittal and in denying Matthews's motion for a new trial.

CONCLUSION

For the foregoing reasons, we **AFFIRM** Matthews's conviction and the district court's denial of his motion for a new trial.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

No. 1:05 CR 00204

[Filed October 23, 2006]

UNITED STATES OF AMERICA PLAINTIFF	)
v.	)
EDWARD JACKSON, *et al.* DEFENDANTS	)

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the following motions and post-trial memoranda: (1) Defendant's Edward Jackson Motion for a New Trial or in the Alternative Judgment of Aquittal [sic], see (Dkt. # 115); (2) Defendant Ernest Matthews' Motion to Join Defendant Edward Jackson's Motion for New Trial or in the Alternative Judgment of Acquittal, see (Dkt. # 116); (3) Defendant Matthews' Motion to Set Aside the Verdict and Enter a Judgment of Acquittal and/or Motion for New Trial, see (Dkt. # 117); (4) Government's Response to Defendants' Motion for New Trial, see (Dkt. # 125); (5) Defendant Matthews' Reply on Motion to Set Aside the Verdict and Enter a

Judgment of Acquittal and/or Motion for New Trial, see (Dkt. # 126); (6) Government's Response to Defendant Matthews' Reply on Motion for Judgment of Acquittal and/or Motion for New Trial, see (Dkt. # 127); (7) Defendant Edward Jackson's Motion to Join Defendant's Response (Reply) to Government's Motion in Opposition to Defendant's Motion for a New Trial, see (Dkt. # 131); (8) Defendant Matthews' Second Motion for New Trial, see (Dkt. # 139); (9) Defendant Edward Jackson's Supplement to his Motion for a New Trial, see (Dkt. # 142); (10) Government's Response to Defendant Matthews' Second Motion for New Trial, see (Dkt. # 143); (11) Defendant Matthews' Reply to Second Motion for New Trial, see (Dkt. # 146); (12) Defendant Matthews' Supplement to Reply for Second Motion for New Trial, see (Dkt. # 148); (13) Defendant Edward Jackson's Motion to Join Defendant Ernest Matthews' Reply to Government's Response to Second Motion for New Trial, see (Dkt. # 149); (14) Government's Response to Defendants' Motion for a New Trial, see (Dkt. # 158); (15) Second Supplemental Motion for a New Trial Based on Newly Discovered Evidence, see (Dkt. # 160); (16) Defendant Matthews' Reply to Government's Response to Second Motion for New Trial, see (Dkt. # 164); (17) Defendant Ernest Matthews Motion to Join Defendant Edward Jackson's Second Supplemental Motion for a New Trial Based on Newly Discovered Evidence, see (Dkt. # 165); (18) Defendant Edward Jackson's Motion to Join Defendant Ernest Matthews' Reply to Government's Response to Second Motion for New Trial, see (Dkt. # 167); (19) Defendant Matthews' Post-Hearing Brief, see (Dkt. # 176); (20) Post Hearing Supplemental Brief, see (Dkt. # 177); (21) Government's *Corrected* Response to Defendants' Post-Hearing Briefs, see (Dkt. # 180); (22) Defendant Matthews' Reply to

Government's Corrected Response, see (Dkt. # 183); and (23) Defendant's Reply to Government's Response Post Hearing Briefs, see (Dkt. # 184). The Court held a hearing regarding the foregoing motions and filings on May 31, 2006. The parties concluded their briefing of the matter on July 17, 2006.

I. BACKGROUND

Special Agent William Leppla ("SA Leppla") of the Department of Justice, Drug Enforcement Agency ("DEA") in Cleveland, Ohio appeared before United States Magistrate Judge William H. Baughman, Jr. on March 28, 2005 and swore out a criminal complaint against the defendants, Edward Jackson ("Jackson") and Ernest Matthews ("Matthews"), alleging violations of 21 U.S.C. § 841(a)(1), (b)(1)(B). See (Dkt. # 1). Magistrate Judge Baughman immediately issued arrest warrants for the defendants. See (Dkt. # 2; Dkt. # 3).

The defendants thereafter appeared before Magistrate Judge Baughman, represented by counsel, for initial appearances. See (Dkt. # 4). Upon oral motion of the Government, Magistrate Judge Baughman ordered the temporary detention of each defendant. See (Dkt. # 5).

Following a detention hearing held on March 31, 2005, Magistrate Judge Baughman issued an order placing Matthews into the custody of the Attorney General. See (Dkt. # 7). Magistrate Judge Baughman ordered the Defendant Edward Jackson released on a $15,000.00 unsecured bond with pre-trial supervision and conditions. See (Dkt. # 7; Dkt. # 8) Magistrate Judge Baughman additionally held a preliminary

examination whereby he found probable cause for the case to be bound over to the Grand Jury for the United States District Court for the Northern District of Ohio (the "Grand Jury").

On April 27, 2005, the Grand Jury issued an Indictment charging the defendants with one count of possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B). See (Dkt. # 12).

On June 14, 2005, the Grand Jury issued a Superceding Indictment charging the defendants with one count of attempted possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B) & 846. See (Dkt. # 54).

The Court held a suppression hearing on July 19, 2005. The Court denied the defendants' motions to suppress by a written Memorandum Opinion and Order issued August 4, 2005. See (Dkt. # 72).

Trial commenced on September 13, 2005.

The Government's Theory of the Case

Assistant United States Attorney Linda Barr presented the Government's theory of the case during her opening statement. Specifically, the Government alleged that on March 26, 2005, the Kansas State Highway Patrol conducted a traffic stop of a flat-bed semi-tractor trailer operating near Kansas City, Kansas. See (Tr. of Trial ("Tr.") at 146-47). The law enforcement officers thereafter discovered thirty-nine bales of marijuana secreted within a shipment of sheet insulation located on the trailer. See (Tr. at 147). Each

bundle weighed approximately 19 or 20 pounds. See (Tr. at 147).

The driver of the semi-tractor trailer – identified during the opening statement as Arnulfo Quintana ("Quintana")[1] – informed the law enforcement officers that he had met in Tucson, Arizona several weeks earlier with an individual known as Martin Guzman ("Guzman"). See (Tr. at 146-48). Guzman had requested Quintana to haul marijuana to Cleveland, Ohio in exchange for compensation. See (Tr. at 148). Quintana had a second meeting with Guzman in Tucson, Arizona during March 2005 whereby he encountered the Defendant, Ernest Matthews. See (Tr. at 149).

At the request of law enforcement officers, Quintana agreed to serve as a cooperating witness and make a controlled delivery. See (Tr. at 147-48). Quintana accordingly continued his journey to Cleveland accompanied by a law enforcement officer. See (Tr. at 147-48).

The Kansas authorities meanwhile advised SA Leppla that a shipment of marijuana would be entering his jurisdiction on March 27, 2005 – a date which was Easter Sunday for various Christian faiths. See (Tr. at 148-49). SA Leppla received information that the delivery would occur in Warrensville Heights, Ohio. See (Tr. at 148).

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[1] As discussed *infra*, the Government provided the defense with Quintana's identity immediately prior to jury selection

At approximately 6:30 p.m., SA Leppla observed two vehicles – a black Chevrolet Trailblazer and a black/grey Chevrolet Suburban – enter the destination area. See (Tr. at 149). SA Leppla further observed the driver of the Chevrolet Suburban, alleged to be Matthews, exit the vehicle and open a garage door. See (Tr. at 149). The two vehicles entered the garage, and after "about ten minutes", the vehicles departed from the area. See (Tr. at 149).

The law enforcement officers meanwhile equipped Quintana with a microphone as well as a transmitter, and proceeded with the controlled delivery. See (Tr. at 150).

Quintana then arrived at the destination. See (Tr. at 150). Five to ten minutes later, the black Chevrolet Suburban arrived operated by Matthews, followed by the black/grey Chevrolet Trailblazer operated by Jackson. See (Tr. at 150). The defendants exited their vehicles and engaged in an conversation with Quintana near the flatbed trailer. See (Tr. at 150-51).

SA Leppla immediately became concerned for the surveillance officers' safety as it was growing dark. See (Tr. at 152-53). He issued a predetermined signal and the law enforcement officers initiated the arrest of the defendants. See (Tr. at 152-53). A subsequent search of the Chevrolet Trailblazer revealed a black duffle bag, three boxes of clear plastic bags, a small amount of marijuana, a tarp, and cellophane sharing characteristics to that covering the marijuana brought from Kansas. See (Tr. at 153).

The Government closed its opening statement by acknowledging that Quintana was subject to

prosecution in Kansas for the offense and that Quintana "will have a choice in that case whether to let it be heard by a jury or plead guilty." (Tr. at 154.)

Defendant Jackson's Theory of the Case

Counsel for Jackson commenced Jackson's theory of the case by advising the jury that Jackson owns and operates a business known as Mobile Wash from the garage referenced in the Government's opening statement. See (Tr. at 155). Defense counsel further advised that on March 27, 2005, Jackson arrived at the garage because co-Defendant Matthews had requested him to steam clean the Chevrolet Trailblazer. See (Tr. at 156).

Defense counsel then presented an alternative theory to that presented by the Government. He asserted that the Government's "principal and star witness", Quintana had been to Cleveland, Ohio in February 2005 and met Jackson at the garage. See (Tr. at 156). At that time, Jackson had presented Quintana with a business card and invited Quintana to utilize his semi-truck washing services whenever Quintana was in Cleveland. See (Tr. at 156-57). Consequently Quintana arrived in Cleveland in mid-March 2005 and Jackson washed Quintana's semi-tractor trailer. See (Tr. at 157). In providing a rationale for Quintana arriving in late-March with marijuana, defense counsel asserted that "Quintana did not want to expose his true connections elsewhere, and that he singled out Mr. Jackson as a pawn in his deception with the [G]overnment." See (Tr. at 157). The opening statement concluded with the contention that the tape recording of the alleged transaction did not mention "pickups, deliveries, money or drugs." See (Tr. at 158).

Defendant Matthews's Theory of the Case

Counsel for Defendant Matthews briefly restated the Government's theory and advised that Quintana did not provide any description of the marijuana's intended recipients at the time of the Kansas arrest. See (Tr. at 159). Counsel for Matthews went on to contend that Matthews did not arrive with Jackson at the garage prior to the arrival of Quintana's semitractor trailer – rather, Jackson was accompanied by an individual known as Dartanyan Thompson. See (Tr. at 160). Matthews thereafter returned with Jackson to the garage for the purposes of cleaning the Chevrolet Trailblazer, as it was a rental vehicle that needed to be returned the following day. See (Tr. at 160). Additionally, Matthews accompanied Jackson to inspect motorcycle parts that Jackson stored at the garage See (Tr. at 161).

Counsel for Matthews advised that the items discovered in the vehicles following the arrest belonged to Matthews's aunt, Chantay Robinson. See (Tr. at 161). Furthermore, Matthews possessed $3,000.00 at the time of his arrest, "[n]ot the amount of money that someone would get for transporting those drugs." (Tr. at 161.)

Counsel for Matthews summarized his theory that SA Leppla selected the destination, radioed back that destination to the semi-tractor trailer, and "sure enough, this individual [Quintana] comes to that location." (Tr. at 162.)

Defense counsel also explained that following the arrest, Matthews consented to a search of his home whereby the law enforcement officers discovered

luggage tags indicating that Matthews had been to Las Vegas in early-March. See (Tr. at 162). Matthews admitted to law enforcement officers that he had been to Arizona, but it "wasn't for a drug deal." See (Tr. at 162).

The next morning, Quintana advised law enforcement officers for the first time that Matthews had been in Arizona with Guzman on March 15, 2005. See (Tr. at 163). Counsel for Matthews advised the jury "[t]hat's not even possible." See (Tr. at 163).

Counsel for Matthews concluded his opening statement by demonstrating that the Government lacked any photographs or video of the alleged transaction. See (Tr. at 163).

SA Leppla's Testimony

The Government presented SA Leppla as its first witness. See (Tr. at 148). SA Leppla testified that late in the night of March 26, 2005/early in the morning of March 27, 2005, he received notice from DEA Acting Group Supervisor, Special Agent Harry Tideswell ("SA Tideswell") in Cleveland, Ohio that a shipment of marijuana would be entering their jurisdiction on March 27, 2005 as part of a controlled delivery. See (Tr. at 167-69). Specifically, SA Leppla was advised that the controlled delivery would occur in the "general vicinity" of Aurora Road in Warrensville Heights, Ohio. See (Tr. at 168). SA Leppla was aware that the alleged destination was a commercial area. See (Tr. at 168-69). SA Leppla further was aware that SA Tideswell was in communication with the DEA agents in Kansas that were accompanying the semi-tractor

trailer (containing the marijuana) to Cleveland. See (Tr. at 169).

SA Leppla attempted to determine the destination for the marijuana. See (Tr. at 171). SA Leppla received information that the destination was near a warehouse marked by a parked brown tractor-trailer. See (Tr. at 171). Based on that description, SA Leppla traveled to the Aurora Road area at approximately 11:00 a.m on March 27, 2005 and through a "process of elimination", believed that the delivery point was a warehouse, subdivided into garages, located at 20905 Aurora Road, Warrensville Heights, Ohio. See (Tr. at 171-72; Gov't's Exs. ## 1-6). SA Leppla conducted surveillance on the area throughout the remainder of the day. See (Tr. at 173-74).

SA Leppla testified that at approximately 6:40 p.m., he observed two vehicles – a black Chevrolet Trailblazer and a black/grey Chevrolet Suburban – enter the destination area. See (Tr. at 175-76). SA Leppla further observed the driver of the Chevrolet Suburban, who he later described as an African-American male wearing a "black puffy jacket", exit the vehicle and open the garage door. See (Tr. at 176, 179). The two vehicles entered the garage and each driver then stood in the outside area near the garage's entrance. See (Tr. at 179). After conversing "for a few minutes", the drivers returned to their vehicles and departed from the area. See (Tr. at 179). SA Leppla observed the drivers, who he identified as African-American males, remain at the garage for approximately "fifteen or sixteen" minutes. See (Tr. at 179).

At approximately 7:10 p.m., SA Leppla observed Quintana arrive at the destination garage and park the semi-tractor trailer parallel to the garage. See (Tr. at 183, 185-86). SA Leppla then observed Quintana exit the semi-tractor trailer and wait. See (Tr. at 187). Five to ten minutes later, the black Chevrolet Suburban and the black/grey Chevrolet Trailblazer arrived at the location. See (Tr. at 188). According to SA Leppla, the Chevrolet Trailblazer parked perpendicular to the garage door. See (Tr. at 188, 191). The Chevrolet Suburban parked "ten or fifteen feet" from the side of the semi-tractor trailer. See (Tr. at 188, 191). The driver of the Chevrolet Suburban, identified as the "larger of the two individuals", walked toward the garage and opened the garage door. See (Tr. at 189-91). The driver of the Chevrolet Trailblazer meanwhile approached Quintana. See (Tr. at 190). The driver of the Chevrolet Suburban then exited the garage, the three men "meet for a short period of time . . . behind the cab . . .near the [d]river's side", and the "larger of the two individuals" returned to the garage. See (Tr. at 191-92). SA Leppla identified the drivers as the "exact same individuals that had arrived earlier." See (Tr. at 190).

SA Leppla then observed Quintana standing on the flat-bed of the semi-tractor trailer apparently in order to remove the outside canvas straps from the area of the trailer carrying the marijuana. See (Tr. at 193). The driver of the Chevrolet Trailblazer appeared to assist Quintana. See (Tr. at 193). The driver of the Chevrolet Suburban exited the garage. See (Tr. at 193).

SA Leppla immediately became concerned for the surveillance officers' safety as it was growing dark. See

(Tr. at 50). Consequently, he requested SA Tideswell to issue a predetermined signal to effectuate the arrest. See (Tr. at 194). Approximately six law enforcement officers emerged from the foliage, identified themselves as law enforcement officers, and initiated the arrest of the three men. See (Tr. at 195).

Law enforcement officers arrested the driver of the Chevrolet Suburban, subsequently identified as Matthews, in the large open bay area of the garage. See (Tr. at 196). SA Leppla arrested the driver of the Chevrolet Trailblazer, subsequently identified as Jackson, in a back room located within the garage. See (Tr. at 197). A black puffy coat was observed on the floor of the warehouse. See (Tr. at 197).

A subsequent search of Matthews's person revealed mobile telephones and $3,235.00 in U.S. currency. See (Tr. at 197). An additional $500.00 in U.S. currency was found on the floor near Matthews. See (Tr. at 197). A search of the Chevrolet Trailblazer that was operated by Jackson revealed a rental agreement issued in the name of Chantay Robinson, a black duffle bag, three boxes of gallon size Glad-zipper bags, and three rolls of contact paper sharing characteristics to that covering the marijuana. See (Tr. at 204, 215 & Gov't.'s Exs. ## 16 -18).

SA Leppla testified that it was his expert opinion with regard to drug trafficking that the Glad-zipper bags and contact paper were commonly utilized to

repackage marijuana.[2] See (Tr. at 209-10). SA Leppla went on to testify that the marijuana weighed approximately 749 pounds. See (Tr. at 215). SA Leppla further testified that "[g]enerally, the traffickers will do everything they possibly can to avoid having the contraband, the drugs, whether it be marijuana or cocaine, and the large sum of money used to pay for

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[2] The Court issued the following instruction to the jury:

> DEA Agent Leppla is testifying in this case as a fact witness, and now is also being allowed to testify as an expert regarding drug trafficking because of his knowledge and experience. And such testimony – remember, you've got to separate his fact testimony and his testimony now as an expert. And such testimony is permitted since knowledge of such activity, drug trafficking, is generally beyond the understanding of the average layman. But it's up to you folks to give DEA Special Agent Leppla's expert opinion the weight that you think it deserves.

See (Tr. at 204). The Court gave the jury a supplemental instruction:

> Although I'm permitting Special Agent Leppla to testify as an expert because of his experience and knowledge of drug trafficking, it's up to you, ladies and gentlemen, to give his opinions such weight as you think they deserve. In deciding how much weight you should give his opinions, consider his knowledge of the things to which he is testifying to, and his experience, and how he reached his conclusions. If you should decide that the opinions that he is giving are not sound or later on outweighed by other evidence, you may disregard his opinions. In other words, you don't have to accept the opinions of the expert. It's up to you folks to decide.

See (Tr. at 219).

that at the same location at the same time." See (Tr. at 224). Accordingly, he opined that it was unsurprising that a large sum of money was neither discovered on the defendants' persons nor in the warehouse. See (Tr. at 224-25).

The Government presented the audio recording of the alleged drug transaction to the jury and SA Leppla testified as to his preparation of the transcript. See (Tr. at 226-34 & Gov't's Exs. ## 13-14).

Counsel for Jackson began his cross-examination of SA Leppla by enquiring if Quintana was de-briefed prior to leaving Kansas. See (Tr. at 238). SA Leppla responded that Task Force Officer Bailiff ("TFO Bailiff") in Kansas had debriefed Quintana in Kansas – however, SA Leppla had no direct contact with TFO Bailiff prior to the arrest of the defendants. See (Tr. at 238). SA Leppla then described his surveillance of the Aurora Road location. He indicated that he did not take any photographs, see (Tr. at 245), that he moved closer to the garage when the vehicles arrived, see (Tr. at 250), and that he did not have a description of Jackson, see (Tr. at 251). In describing his post-arrest investigation of the alleged drug activity, SA Leppla acknowledged that he did not obtain phone records for the phones seized from the defendants, see (Tr. at 255), that he lacked any "records that ever indicated Mr. Jackson contacted Mr. Quintana, Mr. Guzman, anyone", see (Tr. at 255), and that a search of the garage, as well as a consent search of Jackson's home revealed neither "drug records", large sums of currency nor drug paraphernalia. See (Tr. at 258-59). SA Leppla acknowledged that no mention of drugs or marijuana was found on the audio-taped conversation between Quintana and the defendants. See (Tr. at 266).

For his part, counsel for Matthews enquired whether SA Leppla had any description of Matthews prior to the arrest. See (Tr. at 271). SA Leppla again testified that he had no description of the intended recipients or the number of recipients. See (Tr. at 277-73). Defense counsel then pressed SA Leppla as to the exact time that the Chevrolet Suburban and Chevrolet Trailblazer first arrived at the garage. See (Tr. at 280). SA Leppla admitted that he "completely messed up all those times" at the suppression hearing and that the exact time was 6:40 p.m. See (Tr. at 280). SA Leppla further admitted that he had made varied statements regarding the duration that the two drivers waited at the garage – ranging from 26 minutes (suppression hearing), 10-15 minutes (preliminary hearing) and 15-16 minutes (testimony on direct examination) – and that the accurate period was 15-16 minutes. See (Tr. at 282-83)

SA Leppla again testified as to the nature of his surveillance on the date of the arrests, as well as his post-arrest investigation. SA Leppla testified that a records check indicated that the Chevrolet Suburban was owned by Dartanyan Thompson. See (Tr. at 297). He also testified that when the vehicles initially arrived, he repositioned himself from a vantage point of 300 yards away from the garage to approximately 75 yards. See (Tr. at 299). SA Leppla stated that when vehicles arrived for the second time, the Chevrolet Trailblazer arrived first, followed by the Chevrolet Suburban. See (Tr. at 311). SA Leppla again testified that there lacked any video, photographs, finger-print analysis, or phone records arising from the alleged drug transaction. See (Tr. at 325). Upon cross-examination regarding the Glad zipper-lock bags and contact paper, SA Leppla opined that the materials

were insufficient to repackage all of the marijuana. See (Tr. at 356).

Quintana's Testimony

Following the introduction of expert testimony regarding the testing of the marijuana,[3] the Government called Quintana as a witness. Quintana, testifying through an interpreter, stated that he was a self-employed truck driver. See (Tr. at 391). Upon refreshing his recollection with a statement provided to the DEA in Kansas, Quintana testified that he met Guzman sometime in January 2005 while delivering pipes to Guzman's construction company. See (Tr. at 412). Guzman requested that Quintana deliver marijuana in exchange for $25,000.00. See (Tr. at 417). Quintana agreed to provide his semi-tractor trailer for the loading of the marijuana in Tucson, Arizona. See (Tr. at 414-15).

Quintana testified that he met Guzman prior to the loading of the semi-tractor trailer at a truck stop in Arizona. See (Tr. at 415). At this meeting, Guzman was introduced to "a black man . . .in the parking lot . . .while the person was in the passenger's seat." See (Tr. at 416).

The "next day", Quintana left his semi-tractor trailer for loading at an appointed location in Tucson, Arizona. See (Tr. at 410). The subsequent day, Quintana picked up the semi-tractor trailer and began

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[3] The government presented the testimony of James Defrancesco, Senior Forensic Chemist at the DEA North Central Laboratory in Chicago, Illinois. See (Tr. at 372-387).

his journey to Cleveland, Ohio. See (Tr. at 419). Guzman instructed Quintana to travel to Exit 25 of Interstate 480, then "make a right, and at the first light to turn right and then left." See (Tr. at 396).

Quintana testified that on March 26, 2005 he stopped at a rest area near Emporia, Kansas and encountered law enforcement officers. See (Tr. at 392-93). The law enforcement officers were investigating registration numbers and discovered that Quintana's semi-tractor trailer's registration contained an additional digit. See (Tr. at 394). The law enforcement officer obtained Quintana's consent to perform a dog-sniff search of the payload. See (Tr. at 394). Quintana admitted to the law enforcement officers that there was a load of marijuana concealed in the insulation. See (Tr. at 395). Quintana advised the law enforcement officers of the destination and agreed to perform a controlled delivery. See (Tr. at 396).

Quintana testified that a law enforcement officer drove the semi-tractor trailer to a police station in Cleveland, Ohio. See (Tr. at 396-98). There, Quintana was equipped with a radio transmitter and recorder. See (Tr. at 399). He then drove the semi-tractor trailer to the destination provided by Guzman. See (Tr. at 399).

Quintana testified as to his version of the controlled delivery. He arrived at the warehouse and waited for the arrival of the recipients. See (Tr. at 401). About ten minutes later, two "black" men arrived in a "Station Wagon" and a "Suburban." See (Tr. at 401). The pair "greeted" Quintana and asked him to back the truck closer to the garage. Quintana testified that law enforcement officers previously had instructed him to

not back up the truck – consequently, he "told them the transmission was broken and it did not have a reverse." See (Tr. at 403). Quintana then advised the pair that he required pliers to cut the banding around the insulation. See (Tr. at 402). The "bigger one" entered the garage and the "little man" assisted Quintana with loosening the load. See (Tr. at 403-404). Law enforcement officers then arrived at the scene and placed Quintana under arrest. See (Tr. at 407).

Quintana identified the "big guy" as the individual that accompanied Guzman in Tucson, Arizona.

Quintana concluded his testimony on direct examination by acknowledging that he was subject to criminal charges in Kansas arising from this transaction. He advised that no promises regarding sentencing had been made and that he "hope[d]" the judge would give him favorable treatment. See (Tr. at 407-08). Quintana admitted that he had been convicted previously on charges of tampering with identification numbers as well as possession of 60 pounds of marijuana in Arkansas. See (Tr. at 424). Quintana further admitted that he was a user of crystal methamphetamine and that he used the drug on the date he met Guzman and the "big man" in Tucson. See (Tr. at 423).

On cross-examination, counsel for Jackson explored whether Quintana had received any consideration for the testimony presented at trial. Quintana responded that he was told the testimony may "help a little bit, but not much." See (Tr. at 430). Quintana went on to testify that he previously cooperated with the Government upon his arrest for transporting 60 pounds of marijuana. See (Tr. at 432). Quintana

testified that he received 24 hours in jail for that arrest and a fine. See (Tr. at 433). Defense counsel then explored Quintana's admitted history of drug abuse.

Quintana later testified that he had been in Cleveland in January, 2005 because his semi-tractor trailer required repairs. See (Tr. at 446-47). He expressly denied visiting Cleveland in either Febraury or March, 2005. See (Tr. at 446).

As for his cross-examination, counsel for Matthews enquired as to whether Quintana was aware of the identity of the recipients of the marijuana at the time of the delivery. Quintana testified that he was unaware of their identity. Counsel explored the alleged meeting between Quintana, Guzman, and Matthews in Arizona. Quintana could not testify with any certainty whether the meeting occurred on March 13, 14 or 15, 2005. See (Tr. at 451, 453). Quintana explicitly testified that he was "not sure about any dates" in regard to the meeting or the date that the trailer was loaded with marijuana. See (Tr. at 454). In regard to his identification of Matthews, Quintana testified that "all [he] saw was his face" and that he "couldn't see him that well." See (Tr. at 460-61). Quintana testified that Matthews did not have any distinctive features on his face, whereupon defense counsel proffered that Matthews had three distinctive scars on his forehead. See (Tr. at 461). Quintana stated, "I didn't pay attention because all they told me was he was the boss, and I turned and looked at him." See (Tr. at 462). The following colloquy occurred between counsel for Matthews and Quintana:

Q. Yeah but you didn't know what the boss looked like, correct?

A. Well, I saw his face, but they all look the same, but I didn't know what size he was until I got here.

Q. What does he mean by "they all look the same"?

A. Because all black people look the same, and I wasn't paying much attention.

Q. If they all look the same, how can he identify one from another?

A. Because they told me he was going to be here, and he was here because he came and said hi.

Q. Yeah, but you didn't know what he looked like prior to being here on March 27, correct?

A. Well, no. Who I saw, I didn't know if it was him or if it was somebody else. But whoever was here and greeted me, that was the boss.

Q. Okay. So you don't know if it was him or not, correct?

A. Well, Mr. Guzman pointed him out and told me that was the boss an he was going to be waiting for me.

Q. And you didn't see him standing, correct?

A. No.

Q. In Arizona?

A. No.

Q. You couldn't get a real good feel for how big he was then, correct?

A. That's correct.

See (Tr. at 462-63)

Testimony of Task Force Officers Debra Harrison and Jamaal Ansari

The Government proceeded to introduce the testimony of Task Force Officers Debra Harrison ("TFO Harrison") and Jamaal Ansari ("TFO Ansari").

TFO Harrison testified that she conducted the search of Chevrolet Trailblazer following the defendants' arrest. TFO Harrison discovered a rental agreement requiring that the vehicle be returned on March 8, 2005, Glad-zipper lock baggies, contact paper, and a black duffle bag.[4] See (Tr. at 474-76). On cross-examination, TFO Harrison testified that no fingerprint analysis had been conducted on the seized evidence. See (Tr. at 482).

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[4] The Government intended to introduce evidence that a small amount of marijuana was discovered inside of the bag. Upon objection from the defendants, the Court precluded any evidence regarding this small amount of marijuana. See (Tr. at 476-77).

TFO Ansaari testified that he conducted surveillance at the Aurora Road location on March 27, 2005 from approximately 2:30 p.m. until the time of the defendants' arrest. See (Tr. at 487-88). TFO Ansari testified that approximately "45 minutes" after SA Leppla's arrival at 6:30 p.m., a "blue Suburban and a dark – I think it was a Chevy – pulled up." See (Tr. at 489). TFO Ansari testified that the Suburban pulled up to the garage door, the driver wearing a black jacked opened the garage door, and the two vehicles entered the garage. See (Tr. at 489). The pair, identified as African American males, stayed "less than ten minutes", and departed. See (Tr. at 489).

TFO Ansari testified that following the arrival of the semi-tractor trailer, the Suburban arrived and "pulled past the garage door." See (Tr. at 491). The other vehicle was obstructed from TFO Ansari's field of view by the semi-tractor trailer. See (Tr. at 491). TFO Ansari observed a "brief meeting, shaking hands" between the three drivers, see (Tr. at 493), and witnessed the arrest signal. TFO Ansari testified that it was his task to secure a ravine near the garage – therefore, he did not participate in the arrest. See (Tr. at 494).

On March 28, 2005, TFO Ansari transported the defendants from jail to the United States Marshall's Office in Cleveland, Ohio where they were scheduled to meet with a United States Pretrial Services Officers prior to arraignment. See (Tr. at 495). En route, TFO Ansari testified that Matthews enquired as to the reasons for his arrest. See (Tr. at 495). TFO Ansari testified:

> Mr. Matthews asked why he was being arrested and stated that he hadn't done anything. I then advised him that on the 27th, Special Agent Leppla had advised him of his Miranda rights. I then advised him and Mr. Jackson again of their Miranda rights, and I said, "Here's a clue: Have you ever been to Tucson?"
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> . . .
>
> His statement to me was, yes, he had been in Tucson but that he didn't go there to make a deal.
> I advised Mr Matthews, I didn't say that he made a deal.
> He asked, wasn't he free to go to Tucson?
> I said, you can go wherever you want to go, but just remember, you said you were in Tucson and about a deal. I didn't say anything about a deal.

(Tr. at 495-96.)

On cross-examination, counsel for Jackson enquired to the number of officers involved in the arrest whereupon TFO Ansari replied ten to fourteen. See (Tr. at 497). Counsel for Jackson further enquired as to whether TFO Ansari had observed any other vehicles at the Aurora Road location during his surveillance. TFO Ansari responded that a semi-truck had arrived at the location in the early evening. A pick-up truck subsequently arrived, the semi truck's driver entered the pick-up truck, and the pair departed. See (Tr. at 501). TFO Ansari testified that the drivers of those vehicles were "long gone" by the time the Chevrolet Trailblazer and Chevrolet Suburban initially arrived at the scene. See (Tr. at 501).

Upon further cross-examination, counsel for Matthews explored TFO Ansari's surveillance of the garage. Specifically, Ansari testified that the Chevrolet Suburban appeared to be "navy-blue", see (Tr. at 508), and that the defendants ran from the scene at the time the arrest signal was issued, see (Tr. at 510).

Stipulation and the Government's Resting of its Case

The parties thereafter entered a stipulation into the record. The stipulation provided:

> If Sharon Ginther were called to testify she would state that she is an employee of America West Airlines, 4000 East Sky Harbor, Boulevard, Phoenix, Arizona. As such, she is charged with keeping the records of America West Airlines as it relates to the travel of passengers on that airline. She would testify and it is stipulated that the defendant, Ernest Matthews, departed Cleveland on an America West Airlines flight on March 1, 2005 for Las Vegas, Nevada. On March 13, 2005, the defendant, Ernest Matthews, departed Las Vegas, Nevada on an America West Airlines flight and arrived in Cleveland in the early morning hours of March 14, 2005.

(Tr. at 517; Gov't's Ex. # 22).

The Government submitted its exhibits into the record and rested its case in chief. The defendants jointly moved for Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

See (Tr. at 522-24). The Court denied the motions. See (Tr. at 525-26).

Testimony of Gregory Robitson

The defendants elected to present a defense. Jackson advanced the testimony of Gregory Robitson, a former employee of Mobile Wash. See (Tr. at 528). Robitson testified that he was employed at Mobile Wash by Jackson and cleaned with high pressure instruments various fixtures including restaurant stoves/hoodings and floors. See (Tr. at 528- & Def.'s Exs. ## 1-10, 26-31). Robitson further testified that he washed a "couple" of semi-trucks during his employment at Mobile Wash. See (Tr. at 545). According to Robitson, he washed a "red-semi" in March 2005 that was owned by a "|d|ude that had a strong accent." See (Tr. at 553). Nevertheless, Robitson testified that he did not speak with the owner of the semitruck and he was "not sure" if Jackson talked with the owner at that time. See (Tr. at 557).

On cross-examination, the Government enquired at to whether Robitson had talked with Jackson since the date of Jackson's arrest whereupon Robitson responded in the affirmative – nevertheless, he qualified that it was "nothing serious." See (Tr. at 561). Robitson further testified that he could not remember any details regarding the make and model of the red semi-tractor trailer, nor any writing on the side of the trailer. See (Tr. at 564-65).

Testimony of Chantay Robinson

Matthews presented as the next witness his aunt, Chantay Robinson. Robinson testified that she

traveled to Las Vegas in March 2005 with Matthews, Matthews's girlfriend Cynthia Harris, her son Fred, her brother Frank Robinson, and a friend Damon Wheat. See (Tr. at 573-577). Robinson further testified that she had been in an automobile accident prior to the trip and rented a replacement vehicle, a black/grey Chevrolet Trailblazer. She stored in the rear of the rental vehicle the following: (1) Glad zipper-lock bags that she utilized for food storage; (2) rolls of contact paper for ongoing home improvement projects; and (3) a black duffle bag for use in her employment as a nurse. See (Tr. at 580-84).

Robinson went on the describe the events preceding the defendants' arrests. Specifically, Robinson hosted Easter dinner for her family that was attended by her brother, sister and Matthews, as well as several friends, including Jackson. See (Tr. at 585-89). At some point in the evening, Robinson requested Matthews to take the vehicle to Jackson's garage and wash the vehicle as it was required to be returned the following day. See (Tr. at 587-589).

Testimony of Dartanyan Thompson

Matthews next presented Dartanyan Thompson as a witness. Thompson testified that he was a friend of the defendants and attended Robinson's Easter dinner. See (Tr. at 594-95). At some point during the dinner, he exited and drove his Chevrolet Suburban to Jackson's garage in order to inspect motorcycle parts as well as mobile washing machines. See (Tr. at 595-96). Jackson followed in a Chevrolet Trailblazer. See (Tr. at 596). The pair remained at Jackson's garage for "15, 20 minutes" and returned to Robinson's home. See (Tr. at 597).

Matthews subsequently borrowed Thompson's Chevrolet Suburban in order to accompany Jackson to the garage. See (Tr. at 599-600). Thompson opined that Matthews borrowed his vehicle because the Chevrolet Suburban was the last car parked in the driveway. See (Tr. at 599-600).

On cross-examination, the Government enquired as to the events preceding the arrest. Thompson was unable to recall details regarding the time that he ate dinner and the defendants' and his clothing. See (Tr. at 606-608). Additionally, Thompson testified that he had talked to Jackson since the arrest "three or four" times and that they discussed the pending case. See (Tr. at 608).

Testimony of Tom Pavlish

Matthews then presented as a witness Tom Pavlish. Testifying in his capacity as a private investigator, Pavlish testified that he took photographs of the defendants' clothing as well as the interior of the garage following the arrest. See (Tr. at 615-618). His photos included a "blueish green" pair of pants and a blue sweatshirt. See (Tr. at 616).

Testimony of Cynthia Harris

Matthews next presented the testimony of his girlfriend, Cynthia Harris. Harris testified that she and Matthew traveled to Las Vegas on March 1, 2005 and returned to Cleveland, Ohio on March 14, 2005. See (Tr. at 625-26). During the trip, Matthews and Harris traveled to Phoenix and Tucson in order that Harris could interview for employment. See (Tr. at 626). The pair were in Phoenix on March 6-7, 2005,

arrived in Tucson later on March 7, 2005, and departed two days later. See (Tr. at 631-33). Matthews and Harris did not leave each other's company while in Tucson and Matthews did not attend any meetings at a truck stop. See (Tr. at 635).

The Defendants' Resting of their Case

The defendants then submitted their exhibits and rested their cases. The defendants reasserted their Rule 29 motions, and the Court denied the same.

Closing Statements

The Government presented its closing statement and restated its theory of the case. Defense counsel presented their closing statement with each party devoting a substantial effort to attacking Quintana's credibility.

The Verdict and the Present Motions

The jury returned verdicts against each defendant on September 19, 2005. The Court accepted the verdicts and ordered the same verdicts filed.

The present motions ensued.

II. Rule 29 Motion for Judgment of Acquittal

The defendants' initial claim is there was insufficient evidence to support the convictions and the verdicts were contrary to the weight of the evidence. Whether viewed under a sufficiency of evidence standard, Jackson v. Virginia, 443 U.S. 307, 319 (1979), or a manifest weight of evidence standard,

United States v. Ashworth, 836 F.2d 260, 266 (6th Cir. 1988), the defendants contend that the evidence was inadequate to support the convictions for attempted possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B).

When considering a challenge to the sufficiency of evidence to sustain a conviction, the relevant question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. The Court must view all evidence and resolve all reasonable inferences in favor of the government. Id; see also, United States v. Searan, 259 F.3d 434, 441 (6th Cir. 2001). Because the issue is one of legal sufficiency, the Court may neither "independently weigh[] the evidence, nor judge[] the credibility of witnesses who testified at trial." United States v. Talley, 164 F.3d 989, 996 (6th Cir. 1999). Neither may the Court substitute its judgment for that of the jury. See United States v. Hilliard, 11 F.3d 618, 620 (6th Cir. 1993). Finally, "circumstantial evidence alone can sustain a guilty verdict and . . . [such] evidence need not remove every reasonable hypothesis except that of guilt." United States v. Stone, 748 F.2d 361, 362 (6th Cir. 1984).

In order to convict a defendant under 21 U.S.C. § 841(a)(1), the government must prove beyond a reasonable doubt that the defendant (1) knowingly, (2) possessed a controlled substance, (3) with intent to distribute it. See United States v. Jackson, 55 F.3d 1219, 1225 (6th Cir. 1995) (citing United States v. Peters, 15 F.3d 540, 544 (6th Cir. 1994)). To convict a defendant of attempt, the government must prove (1) the defendant's intent to commit the criminal

activity; and (2) that the defendant committed an overt act that constitutes a "substantial step" toward commission of the crime. United States v. Bilderbeck, 163 F.3d 971, 975 (6th Cir. 1999).

The application of the foregoing standard to the case at bar reveals that the defendants' Rule 29 motions are without legal or factual support. The undisputed evidence presents compelling factors supporting the convictions. It was undisputed at trial that a semi-tractor trailer containing more than seven hundred pounds of marijuana departed Arizona and ultimately arrived at Jackson's garage. It was further undisputed that Jackson arrived at the garage prior to the arrival of the marijuana. Additionally, it is undisputed that Matthews and Jackson appeared at the garage shortly after the arrival of the marijuana and held conversations with the driver of the semi-tractor trailer. Moreover, it was undisputed that the pertinent events occurred on Easter Sunday at a time when there would be a less chance of observation by third parties.

The evidence presented by the Government further supports the convictions. At least two officers witnessed a figure fitting Matthews's description appear with Jackson at the garage prior to the marijuana's arrival. Additionally, SA Leppla observed Jackson begin to assist Quintana with the removal of the straps from the area of the semi-tractor trailer containing marijuana. An audio-recording of the conversation between Jackson and Quintana lacks any explicit mention of drugs – however, it is uncontroverted that Jackson attempted to have Quintana back the semi-tractor trailer nearer to the garage and that he was concerned with suspected on-

lookers. Furthermore, SA Leppla testified as an expert in drug trafficking that the evidence seized from the Chevrolet Trailblazer – including, a tarp, contact paper, and Glad zipper-lock plastic bags – were consistent with marijuana trafficking.

In short, the Government presented evidence that (1) the defendants appeared at the garage in preparation for the arrival of the semi-tractor trailer; (2) the semi-tractor trailer arrived at the destination; (3) the defendants again appeared shortly after the arrival of the semi-tractor trailer; (4) the defendants held a discussion with the driver of the semi-tractor trailer; (5) Jackson appeared to assist with the removal of the marijuana from the semi-tractor trailer; and (6) the defendants had in their possession items utilized in drug trafficking. Moreover, the Government presented the testimony of Quintana that suggested that Matthews had appeared in Arizona with the alleged source of the marijuana several week earlier.

The defendants attempt to challenge the evidence by arguing that SA Leppla and TFO Ansari presented different accounts of the events preceding the arrest. The defendants additionally emphasize the lack of any evidence describing them as the intended recipients of the marijuana. Furthermore, the defendants repeatedly stress that they never observed the marijuana.

A review of the entirety of the record reveals that SA Leppla presented an account that differed from TFO Ansari's in several respects. First, SA Leppla and TFO Ansari testified differently as to which vehicle – the Chevrolet Suburban or the Chevrolet Trailblazer – appeared first at the garage. Similarly, SA Leppla

testified that there was little traffic near the garage on the date of the arrest, while TFO Ansari testified to the events surrounding the semi-tractor trailer driver being pick-uped by a white pick-up truck. SA Leppla also testified that he did not observe the defendants run at the time of the arrest, while TFO Ansari testified that he observed the defendants run toward the garage. Nonetheless, these distinctions were emphasized by the defendants during cross-examination. They merely address the credibility of the defendants – a factor this Court is prohibited from considering under Rule 29.

Likewise, the lack of any reference to "marijuana" on the audio-recording or any direct testimony indicating that the marijuana was exposed to the defendants does not necessarily negate the inferences to be drawn from the other evidence presented in the record. These alleged deficiencies were presented and emphasized by the defendants during cross-examination. The defendants further advanced alternative theories for their appearance at the garage as well as the existence of evidence such as the contact paper, Glad zipper-lock plastic bags, and the bag.

Taking the evidence in the light most favorable to the Government, the Court finds that a rational juror could conclude beyond a reasonable doubt that Jackson's and Matthews's independent conduct, when viewed objectively, unequivocally corroborates their individual and subjective intent to commit the crime as charged. As a result, the Court finds that there was sufficient evidence presented at trial to support their convictions for attempted possession with the intent to distribute marijuana.

III. Rule 33 Motion for New Trial

The defendants request a new trial pursuant to Rule 33 of the Criminal Rules of Federal Procedure. Rule 33 of the Federal Rules of Criminal Procedure provides that "[u]pon a defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." FED. R. CRIM. P. 33(a). When presented with a Rule 33 motion, the district court may weigh the evidence and assess the credibility of the witnesses; "it has often been said that [it] sits as a thirteenth juror." United States v. Solorio, 337 F.3d 580, 589 n.6 (6th Cir. 2003) (internal citations omitted).

The defendants' motions seek a new trial citing various instances of newly-discovered evidence. To warrant a new trial on the basis of newly-discovered evidence, the defendants generally must establish: "(1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal." United States v. Jones, 399 F.3d 640, 648 (6th Cir. 2005) (citing United States v. O'Dell, 805 F.2d 637, 640 (6th Cir. 1986)). The Court shall consider each of the defendants' assertions in turn.

The Government's Purported Brady Violations

The defendants repeatedly have asserted throughout the proceedings that the Government has violated various discovery rules by failing to provide a statement made by Quintana following his arrest in Kansas. The matter was the subject of multiple

discussions at trial and was fully addressed by the Court at that time. In short, the Government provided a packet to defense counsel immediately prior to jury selection indicating that it was Jencks material. See (Tr. at 7-8). Included in this material, *inter alia*, was a report prepared by TFO Bailiff therein referring to statements made by Quintana following his arrest. Defense counsel suggested that this material was exculpatory Brady material as Quintana did not have any description of the defendants and that, notwithstanding, that Quintana indicated that he would be compensated in the amount of $25,000.00 for delivering the marijuana, the defendants possessed approximately $3,500.00 at the time of their arrest. See (Tr. at 136-137). The Court agreed that the information may be "beneficial" to the defendants and ordered the defendants to hold Quintana in the immediate area for potential re-cross examination by the defendants. As the Government intended to call Quintana on Wednesday, the Court ordered the Government to hold Quintana until the following Monday thereby providing the defendants with the opportunity to review the material over the weekend. See (Tr. at 208-10). The defendants did not recall Quintana as a witness.

In spite of the defendants' repeated and lengthy arguments regarding the late disclosure by the Government of the purported Jencks and Brady material, their legal argument lacks merit. It is well-settled that in the context of a motion for new trial that the defendants' burden is less rigorous where, as here, the new evidence is exculpatory evidence which the Government failed to turn over in violation of the requirements of Brady v. Maryland, 373 U.S. 83 (1963). See United States v. Frost, 125 F.3d 346, 382

(6th Cir. 1997). To warrant a new trial arising from a Brady violation, (1) "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) "that evidence must have been suppressed by the [government], either willfully or inadvertently;" and (3) "prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice (or materiality) is established by showing that "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Strickler, 527 U.S. at 289. "A reasonable probability is one sufficient to undermine confidence in the outcome." United States v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991) (internal quotation omitted). Thus, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Strickler, 527 U.S. at 289-90.

This Court need not resolve whether the information presented in the material was exculpatory information subject to Brady's disclosure requirements. Faced with the potential that the Government had failed to meet its Brady obligations, the Court employed the approach endorsed by the United States Court of Appeals for the Sixth Circuit in United States v. Davis, 306 F.3d 398 (6th Cir. 2002) and United States v. Patrick, 965 F.2d 1390 (6th Cir. 1992). There, the court held that a no prejudice arises from a tardy Brady or Jencks disclosure where the court provides the defendant with the opportunity to recall the witness for cross-examination upon reviewing the materials. See Davis, 306 F.3d at 421;

Patrick, 965 F.2d at 400; see also United States v. Blackwell, 459 F.3d 739, 760 (6th Cir. 2006) ("No Brady violation occurred in this case. The Defendant received all three documents during trial. Furthermore, the district court expressly granted Defendant the opportunity to re-cross examine Stephan-Blackwell and took no action to prevent Defendant from calling Benoit as a witness. Accordingly, Defendant had the opportunity to examine both Stephan-Blackwell and Benoit in light of the disclosed documents and any prejudice resulting from Defendant's failure to do so is not attributable to the government's violation of the principles set forth in Brady.") (Internal citations and quotations omitted).

In the present case, the Court provided the defendants with the opportunity to re-call Quintana following a review of the information provided by the Government. The defendants neither recalled Quintana, nor advised the Court that additional time was necessary to review the materials. In an attempt to demonstrate *any* prejudice, the defendants presently suggest that they would have subpoenaed TFO Bailiff had they possessed this information prior to trial. The argument is spurious at best. All parties to this case were aware from the date of the preliminary hearing that Quintana had been arrested in Kansas. It was reasonable to conclude that TFO Bailiff – identified throughout the preliminary and suppression hearings as the agent in Kansas that traveled with Quintana to Cleveland – may have information relevant to the case. Nonetheless, at no time during the pre trial or trial proceedings did the defendants express an intention to subpoena TFO Bailiff. Accordingly, the defendants are precluded from raising the issue at this late stage.

The Court reaches a similar conclusion regarding the defendants' claims that the Government failed to disclose a tape recording of a telephone conversation made between Quintana and Guzman following the Kansas arrest. It is undisputed that the existence of the tape recording was not disclosed until the material was provided to the defendants. See Kyles v. Whitley, 514 U.S. 419, 433 (1995) (finding that the constitutional duty of disclosure attaches regardless of the government's good or bad faith, and regardless of whether the defense requested that evidence or failed to make any request at all). It is further undisputed that the audiotape is completely inaudible. The Court agrees with the defendants that the issue of inaudibility should have been made by the Court. The Court further agrees that prudence commands that the Government disclose the existence of such a tape to the defendant. While it is well-settled that the government "has no Brady obligation to 'communicate preliminary, challenged, or speculative information'", United States v. Diaz, 922 F.2d 998, 1006 (2d Cir.1990) (quoting United States v. Agurs, 427 U.S. 97, 109 n. 16 (1976) (citations omitted)), the government maintains an "affirmative duty to resolve doubtful questions in favor of disclosure", Agurs, 427 U.S. at 106.

However, the defendants' arguments in support of a new trial again fail as a matter of law. First, as discussed *supra*, the principles of Brady are not violated by a tardy disclosure. See United States v. Blood, 435 F.3d 612, 627 (6th Cir. 2006) ("Brady generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose" and || a "[d]elay only violates Brady when the delay itself causes prejudice") (quotation marks and citation omitted). The defendants concede that

they possessed information regarding the existence of the tape upon the Government's disclosure of the purported Jencks material. However, they did not become aware of the matter until after they "re-examined" the documents post-trial. Consequently, this was not "newly discovered" evidence as required pursuant to Rule 33. Secondly, as the tape was inaudible, the defendants are unable to demonstrate any prejudice emanating from the Government's failure to disclose. While the defendants assert that they would have utilized such evidence to further demonstrate the alleged ineptness of the Government's investigation, such evidence would have been cumulative in light of their persistent attempts to demonstrate the lack of any photographic, video, and telephonic evidence during the cross-examination of the Government's witnesses.

The Purported Plea Agreement Between Quintana and Kansas Authorities

The defendants raised in their post trial motions and memoranda the notion that the Government and the state authorities in Kansas had colluded to provide Quintana with a reduced sentence in his state proceedings in exchange for his co-operation in the federal matter. When the issue was raised during trial, AUSA Barr advised the Court outside of the presence of the jury that she had communicated with state authorities in Kansas, who in turn advised her that Quintana was required to enter a plea of guilty or proceed to trial. As discussed *supra*, the Court permitted defense counsel to enquire into the state proceedings during Quintana's cross-examination. The Court instructed the jury during the cross-examination of Quintana and at the close of the evidence to exercise

caution when considering Quintana's testimony in light of the potential consideration offered by state authorities. After the trial, defense counsel received correspondence from authorities in Kansas that all charges had been dismissed against Quintana.

The parties explored the issue during the post-trial hearing. The record before the Court reveals no evidence suggesting that AUSA Barr had any contact or communication with the Kansas authorities regarding an offer of consideration for Quintana's testimony in the federal proceedings. Accordingly, the defendants' arguments lack merit.

Quintana's False Testimony

A review of the post-trial filings reveals the defendants' central contention that Quintana's testimony was patently false. Notwithstanding the volumes of filings and evidence presented to the Court, the issue is relatively straightforward. Quintana testified that he had visited Cleveland, Ohio in January 2005 to have a truck repaired. He further testified that he had not visited Cleveland at any other time prior to the arrest. Moreover, Quintana testified that he met Matthews in Cleveland in mid-March 2005 (specifically March 15th, although he was unsure regarding the exact date) and the semi-tractor trailer was loaded with marijuana the following day.

The defendants have presented the Court with evidence – including hotel reservations, credit card receipts, bills and expert handwriting analyses – demonstrating a substantial likelihood that Quintana's allegations regarding his visits to Cleveland, Ohio and his meeting with Matthews and Guzman were false.

Beyond damaging the credibility of Quintana's entire testimony, the newly discovered evidence is relevant in two significant respects: (1) it demonstrates that Quintana could not have met with Matthews on March 15, 2005 as he was in Cleveland, Ohio; and (2) Quintana's presence in Cleveland, Ohio in March, 2005 (and most likely February) provides corroboration to Jackson's claim that he washed Quintana's semi-tractor trailer in March, 2005.

This Court need not delve into the procedural gymnastics that the parties have raised concerning whether the defendants could have discovered this evidence at an earlier date by issuing trial subpoenas or that the defendants may have been aware of Quintana's visits to these hotels prior to trial. The Court is faced with a Government witness that by any reasonable interpretation of the current record before the Court presented false testimony.

The Court determines, however, that Quintana's purportedly false testimony does not undermine confidence in the verdict in this case. Having heard the testimony and evidence at trial, and the benefit on extensively examining the record in this case, the Court finds that newly-discovered evidence is merely cumulative and impeaching to the extent that it pertains to the dates and meeting with Guzman and Matthews. Succinctly stated – defense counsel fatally damaged Quintana's credibility throughout their cross-examination. As discussed *supra*, Quintana could not remember dates,; he held a sporadic memory of any events; he lacked any ability to identify Matthews notwithstanding severe scarring on Matthews's forehead; he admitted to using crystal methamphetamine during important events; and he

had prior convictions for drug use. As further discussed *supra*, Quintana admitted to previously cooperating with the Government in a drug case and that he "hoped" for cooperation in the current case. Indeed, as the defendants suggest in other portions of the present motions, Quintana's trial testimony, on its face, was inherently lacking in credibility. As a result, any additional evidence regarding the falsity of the alleged meeting between Quintana, Guzman and Matthews is cumulative.

The Court therefore must determine whether the addition of the other aspects of the newly discovered evidence – particularly Quintana's visits to Cleveland throughout early 2005 - would impact the verdicts in this case. At first blush, Quintana's visit to Cleveland appears to support the evidence adduced at trial regarding Jackson's and Robitson's washing of the semi-tractor trailer in mid-March 2005. In theory, this evidence supports Jackson's assertion that upon the arrest in Kansas, Quintana desired to conceal the true destination of the marijuana and merely selected Cleveland because he had been there recently to have his semi-tractor trailer washed. However, an extensive review of the record reveals a significant shortcoming in this theory. Robitson's testimony does not support the defense's arguments. Robitson provided no details regarding the semi-tractor trailer that he washed other than it being red. His testimony was inconsistent as he suggested that the owner had a Spanish accent – yet, he did not speak to the owner nor could he recall if anyone else engaged in conversation. Assuming that the evidence of Quintana's visit was included into the record, it would be a leap in speculation for the jury to accept Jackson's theory of the case.

The newly-discovered evidence undeniably strikes at the credibility of Quintana's entire testimony. Assuming *arguendo* that all portions of Quintana's testimony are removed from the record except those that are undisputed – i.e., that he was arrested in Kansas with more than 700 pounds of marijuana, and that he traveled to Jackson's garage with the marijuana – the question before the Court is whether the convictions stand. The Court answers this enquiry in the affirmative. As discussed *supra*, Quintana's testimony regarding his alleged meeting with Guzman and Matthews was lacking in credibility and was subject to little, if any, weight by the jury. As further discussed *supra*, there was substantial undisputed evidence linking Jackson and Matthews to the marijuana such as their timely arrivals to the garage on Easter Sunday. The jury was instructed to engage in these considerations in their thorough review of all the evidence.

As a result, this Court will not disturb the conclusions reached by the jury following a painstaking and well-reasoned analysis of the evidence. See, e.g., United States v. Sullivan, 431 F.3d 976, 985-86 (6th Cir. 2005) (finding no Brady violation where government became aware of allegedly exculpatory DNA samples post-trial, but conviction nevertheless worthy of confidence in light of other corroborating evidence).

Accordingly, the foregoing motions for new trial are **DENIED**.

IT IS SO ORDERED.

s/ Peter C. Economus - October 23, 2006
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

No. 1:05 CR 00204

[Filed August 4, 2005]

UNITED STATES OF AMERICA PLAINTIFF	)
v.	)
EDWARD JACKSON, *et al.* DEFENDANTS	)

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the Motion for Disclosure of Confidential Government Informant, see (Dkt. # 26); and Motion for Voir Dire of Identification Witnesses and for Order Disclosing Other Evidence Used in the Identification Procedure, see (Dkt. # 25).

Disclosure of Confidential Informant

The defendant, Ernest Matthews, requests the disclosure of the confidential informant / cooperating witness ("CW") that assisted law enforcement officers in the completion of a controlled delivery of marijuana on March 27, 2005. See (Dkt. # 26). The Government

opposes disclosure on grounds that it intends to call the CW as a witness at trial. See (Dkt. # 40 at 6-7).

In determining whether to disclose the identity of a confidential informant, the Court balances "the public interest in protecting the flow of information against the individual's right to prepare his defense." United States v. Perkins, 994 F.2d 1184, 1190 (6th Cir. 1993). The United States Court of Appeals for the Sixth Circuit has held that disclosure of a confidential informant's identity was unnecessary where:

> Government counsel in his opening statement identified by name his witnesses, revealing at the time the name of the informant. The informant was then called as the Government's first witness and was cross-examined in great detail. There is nothing in the record to indicate that counsel was in anywise taken by surprise. There was no request for continuance. Under the circumstances, we find no persuasive reason to depart from the aforementioned general rule that in a case of this type the Government need not disclose prior to trial the identity of any of its witnesses.

Perkins, 994 F.2d at 1191. Similarly, in the present case, the Government has expressed well in advance of trial its intention to call the CW as a witness. The CW therefore will be subject to cross-examination. Furthermore, as the defendants had the opportunity to observe the CW at the time of arrest, as well as question law enforcement officers during pre-trial proceedings as to the nature of the CW's involvement, it cannot reasonably be argued that prejudice or surprise will result from the CW's testimony

Consequently, this case presents no facts compelling the Court to depart from the general rule that disclosure is not required where the CW will testify at trial.

Voir Dire of the CW

The defendant next requests that he be permitted to examine the CW, outside the presence of the jury, regarding a spontaneous identification made by the CW.[1] See (Dkt. # 25). Specifically, the CW informed law enforcement officers at the time of the arrests that he recognized the defendant Matthews from a prior meeting in Tucson, Arizona. The CW indicated that he observed the defendant Matthews in the company of the alleged source of the marijuana, Martin Guzman. The defendant seeks to voir dire the CW as to the circumstances giving rise to this identification.

As a threshold matter, the Court observes that the defendant's motion erroneously asserts that the identification occurred through a traditional line-up or photograph array. See (Dkt. # 25 at 3-5). In addition, counsel for the defendant's questioning during the motion to suppress hearing also revealed the defense's view that the law enforcement officers may have brought the CW to the defendant and requested an identification. Counsel for the Government advised the Court that was not the case; rather, the CW spontaneously made the identification at the time of the arrest. The Government agreed to provide the

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[1] The defendant's motion refers to another defendant, David P. Ellis. See (Dkt # 25 at 5) David P Ellis is not a party to the present action

defendant with all information pertinent to the identification

In light of the foregoing, the Court finds that circumstances of this case do not give rise at the present time to the due process / right to counsel concerns expressed in United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), and their progeny. While the Court is mindful of the potentially strong impact of eyewitness identification at trial, see United States v. Smithers, 212 F.3d 306 (6th Cir. 2000), the facts of this case, coupled with the Government's assurance that it will provide all pertinent evidence regarding the identification to the defendant, render a voir dire of the CW unnecessary.

Accordingly, the Court hereby orders that the Motion for Disclosure of Confidential Government Informant, see (Dkt. # 26); and Motion for Voir Dire of Identification Witnesses and for Order Disclosing Other Evidence Used in the Identification Procedure, see (Dkt. # 25), are **DENIED**.

IT IS SO ORDERED.

s/ Peter C. Economus - August 4, 2005
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE